Supreme Court, U.S.
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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

In re WILKER S. CONNER and JANICE M. CONNER,

Debtors.

JOHN D. BARKLEY, TRUSTEE,

Petitioner,

vs.

WILKER S. and JANICE M. CONNER, ORTHOPEDIC CLINIC, 401K PROFIT SHARING PLAN, and TRUST AGREEMENT, PUREGO COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does a provision in an ERISA qualified pension plan giving a participant the right to withdraw after-tax contributions at any time for any reason disqualify that portion of funds from ERISA protection?

2. Are after-tax contributions to an ERISA qualified plan excluded from property of the bankruptcy estate under the Bankruptcy Code even if the debtor-participant has unfettered access to those contributions?

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STATUTES INVOLVED

BANKRUPTCY CODE

11 U.S.C. § 541. Property of the estate.

> **(a) The commencement of a case under subsections 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:**
>
> > **(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.**
> >
> > . . .
>
> **(c)(2) A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.**
>
> . . .

EMPLOYEE RETIREMENT INCOME SECURITY PROGRAM

29 U.S.C. § 1056. Form and payment of benefits.

...

(d) **Assignment or alienation of plan benefits. (1) Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.**

(2) For purposes of paragraph (1) of this subsection, there shall not be taken into account any voluntary and revocable assignment of not to exceed 10 percent of any benefit payment, or of any irrevocable assignment or alienation of benefits executed before the date of enactment of this Act [enacted Sept. 2, 1974]. The preceding sentence shall not apply to any assignment or alienation made for the purpose of defraying plan administration costs. For purposes of this paragraph a loan made to a participant or beneficiary shall not be treated as an assignment or alienation if such loan is secured by the participant's accrued nonforfeitable benefit and is exempt from the tax imposed by section 4975 of the Internal Revenue Code of 1986 [26 USC § 4975] (relating to tax on prohibited transactions) by reason of section 4975(d)(1) of such Code [26 USC § 4975(d)(1)].

OPINION BELOW AND JURISDICTION OF THIS COURT

The Petitioner John D. Barkley, as Trustee for the Chapter 7 estate, initiated an adversary proceeding in the Bankruptcy Court of th ` District of Arizona asking the court to order the Respondents to turn over a certain portion of funds in the debtor's ERISA qualified plan. The funds in dispute are after-tax contributions to the plan and subject to the debtor's unrestricted right of withdrawal. The Bankruptcy Court granted the debtor summary judgment on the complaint and ordered that the after-tax account was not property of the estate under 11 U.S.C. § 541(c)(2), thereby allowing the debtor to retain the disputed funds at the expense of the bankruptcy estate's creditors. Appendix Exhibit 1. The Petitioner timely appealed to the Ninth Circuit Bankruptcy Appellate Panel (BAP). The BAP affirmed on April 29, 1994, (Appendix Exhibit 2) and the Petitioner timely appealed to the Ninth Circuit Court of Appeals. In a published opinion dated January 11, 1996, the Court of Appeals affirmed. Appendix

Exhibit 3. The Petitioner then filed a Petition for Rehearing En Banc with the Ninth Circuit Court of Appeals. A panel of the Ninth Circuit Court of Appeals denied the petition for rehearing and rejected a hearing en banc. Appendix Exhibit 4.

The Petitioner seeks review of the Ninth Circuit's judgment and asks the United States Supreme Court to interpret federal law pertaining to ERISA qualified plans. The Petitioner believes the decisions below conflict with the plain meaning of the statutory text and are not supported by the Court's decision in Patterson v. Schumate, 504 U.S. 753, 112 S. Ct. 2242 (1992). Lower courts need clarification on an important question of federal bankruptcy law so that they may properly carry out the objectives of the Bankruptcy Code.

This Court has jurisdiction under 28 U.S.C. § 1254(1) and Rule 10.1(c) of the Supreme Court Rules to consider this timely request for review of the Ninth Circuit Court of Appeals opinion of January 11, 1996.

STATEMENT OF THE CASE

I. Overview.

Petitioner, as Trustee of the Chapter 7 bankruptcy estate, seeks turnover of certain moneys in the Debtor-Respondent's 401(k) retirement plan account ("the Plan"). These funds were after-tax contributions made by Respondent which she may withdraw, under the terms of the Plan, "at any time for any reason." Because these after-tax contributions are traceable and treated differently from other funds in the Plan, they are not ERISA qualified. It is only these funds, not the other contributions in the account, that Petitioner seeks to include as property of the bankruptcy estate.

The Ninth Circuit upheld the bankruptcy court's decision that these funds are part of an ERISA[1] qualified plan and are therefore, under this Court's decision in Patterson v. Schumate, 504 U.S. 753, 112 S. Ct. 2242 (1992), not property of the estate pursuant to § 541(c)(2) of the Bankruptcy Code.[2]

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1 Employment Retirement Income Security Act of 1974.

2 11 U.S.C. § 541(c)(2).

The Petitioner appeals the lower court's ruling on grounds that it misinterpreted and misapplied this Court's decision in Patterson. Without scrutinizing whether the funds in question are in an ERISA qualified plan and thus subject to ERISA's transfer restriction,[3] the lower courts have deferred to the Plan drafters or administrators, who denominate the plan as ERISA qualified, in excluding the after-tax contributions from the bankruptcy estate.

II. Facts and procedural history.

Respondents, Wilker and Janice Conner, are debtors who filed a voluntary Chapter 7 petition on May 2, 1991. Pursuant to 11 U.S.C. § 541(c)(2) and ERISA, 29 U.S.C. §§ 1056(d) and 1144(a), they claimed that the bankruptcy estate did not include Janice Conner's interest in an employer pension plan, called the Orthopedic Clinic 401(k) Pension and Profit Sharing Plan. Janice Conner has been employed by the Orthopedic Clinic ("the Clinic"), a professional association, since 1956. The Clinic established its profit sharing plan in

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3 29 U.S.C. § 1056(d).

1980 to hold in trust employee and employer contributions. While most of the Plan funding was derived from employee pre-tax dollars, employer matching contributions and rollovers from other retirement accounts, a portion came from employee after-tax contributions. These after-tax contributions are the funds at issue in this case. The Plan holds after-tax contributions in a separate account, maintains separate records for those funds and, as of 1988, controls those funds by separate trust provisions.

The Plan contains an anti-alienation provision conforming with ERISA's anti-alienation requirement expressed in 29 U.S.C. § 1056(d). Section 8.10 of the Plan reads as follows:

> Except as provided under Section 8.9 [plan loans], the interest herein, whether vested or not, of any Participant, former Participant or Beneficiary, shall not be subject to alienation, assignment, encumbrance, attachment, garnishment, execution, sequestration or other legal or equitable process, or transfer ability by operational law in the event of bankruptcy, insolvency or otherwise.

Appendix Exhibit 5 at 39. In 1988 the Plan was amended regarding the after-tax account as follows:

After-Tax Account

> **You may withdraw amounts from your after-tax voluntary contributions at any time and for any reason.**

Appendix Exhibit 6 at 2. Under this amendment, the after-tax contributions are treated differently from the other contributions in the Plan in a significant way. As of 1988, the after-tax contributions are no longer subject to ERISA's transfer restriction as provided in 29 U.S.C. § 1056(d) and are thus not ERISA qualified. The Summary of the amended Plan explains to employees:

> **Withdrawals of after-tax voluntary contributions (which were allowed prior to January 1987) are not subject to the above hardship restrictions.**

Appendix Exhibit 5 at 9.

John Barkley, as Trustee of the bankruptcy estate, initiated this adversary proceeding to compel the Respondents to turn over Janice Conner's after-tax account to the bankruptcy estate. At that time, Respondent's after-tax account held approximately $38,000, her before-tax account held over $181,000, and she was fully vested in both accounts

at all times. The employer and the Conners resisted on the basis of Patterson v. Schumate, supra, arguing that because the after-tax contributions are held in an ERISA qualified plan, they are not property of the bankruptcy estate under § 541(c)(2) of the Bankruptcy Code. They also cited In re Reuter, 11 F.3d 850 (9th Cir. 1993) as supporting authority, which held that even though participants of the employer's "Thrift Plan" could withdraw their own contributions from the plan at any time, the plan was excluded from the bankruptcy estate.

Holding without explanation, that Patterson controlled, the Bankruptcy court denied the motion for turnover. Appendix Exhibit 1 (Bankruptcy Court Minute Entry Order of April 6, 1993). Under 28 U.S.C. § 158 and Fed. R. Bankr. Proc. 8001, the Trustee timely appealed the decision to the Ninth Circuit BAP. Deferring to the Ninth Circuit's decision in Reuter, the BAP affirmed the Bankruptcy Court in an opinion filed April 29, 1994. Appendix Exhibit 2 (In re

Conner, 165 B.R. 901 (9th Cir. BAP 1994)). Although one judge questioned whether the debtor could show that the anti-alienation provision of the Plan could satisfy the terms of § 541(c)(2), the judge concurred, stating that the panel was obligated to follow Reuter as controlling authority. Id. at 903-904.

The Trustee appealed the BAP decision to the Ninth Circuit Court of Appeals pursuant to 28 U.S.C. § 158(d) and Fed. R. App. Proc. 6. On January 11, 1996, the Court of Appeals affirmed the BAP decision. Appendix Exhibit 3. On finding that "the Supreme Court appears to have discounted any distinctions based on the debtors' control of their assets," the court believed it was following the teachings of Patterson. Id. (Barkley v. Conner, 73 F.3d 258, 260). The court failed, however, to analyze whether the after-tax contributions should be considered part of an ERISA qualified plan, an inquiry required by Patterson. The Trustee then filed a petition for rehearing en banc, which was denied. Appendix Exhibit 4.

The Trustee now seeks a writ of certiorari asking the Supreme Court to review the Ninth Circuit's opinion.

ARGUMENT

I. Summary of Argument

After-tax contributions to a pension plan to which a participant has unfettered access are not ERISA qualified because: (1) ERISA does not govern after-tax contributions, and (2) the participant's unrestricted access to those funds violate ERISA's anti-alienation provision. Because the funds in question are not part of an ERISA qualified plan, the court must look to other applicable non-bankruptcy law to determine whether § 541(c)(2) of the Bankruptcy Code excludes these assets from the debtor's bankruptcy estate. Respondents have not shown any non-bankruptcy law outside ERISA that would prohibit transfer of these assets.[4] For the reason that IRA and Keogh accounts are not exempt from property of the bankruptcy estate under 11 U.S.C. § 541(c)(2) -- they lack enforceable transfer restrictions, Patterson, 504

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[4] Arizona's laws relating to spendthrift trusts protect assets only if the trust instrument prohibits voluntary or involuntary transfers. A.R.S. §§ 14-7701 to 7710.

U.S. at 762-763, 112 S. Ct. at 2249 -- pension plan funds that the participant can withdraw at any time for any reason also are not excluded from the estate. The Respondents, therefore, should be required to turn over the Conners' after-tax contributions to the bankruptcy estate because they are not subject to an enforceable transfer restriction as required by 11 U.S.C. § 541(c)(2). In short, these funds are not excluded from the estate under § 541(c)(2) of the Bankruptcy Code.

The writ of certiorari should be granted because bankruptcy courts, the bankruptcy appellate panel, and circuit courts have misapplied Patterson. Instead of examining whether the assets in question are in an ERISA qualified account, lower federal courts have given blanket approval to exempting pension plan assets that are alleged to be part of an ERISA qualified plan without examining whether those assets fully comport with ERISA requirements. The Petitioner asks the Court to give needed guidance to the lower courts and bankruptcy trustees in determining which

pension funds are or are not ERISA qualified and thus excluded from property of the bankruptcy estate under § 541(c)(2).

II. The Ninth Circuit has misinterpreted and misapplied the ruling in *Patterson*.

A. *Patterson v. Schumate.*

Prior to the Court's decision in Patterson v. Schumate, the federal circuits were split over the application of § 541(c)(2) to ERISA qualified plans. Some courts, including those in the Ninth Circuit, believed that this section pertained only to state law and held that ERISA qualified plans were not excluded from the bankruptcy estate under § 541(c)(2). *See e.g.*, In re Daniel, 771 F.2d 1352 (9th Cir. 1985); In re Lichstrahl, 750 F.2d 1488 (11th Cir. 1985); In re Graham, 726 F.2d 1268 (8th Cir. 1984); Matter of Goff, 706 F.2d 574 (5th Cir. 1983). Other courts held such plans were excluded from the estate. *E.g.*, In re Walker, 959 F.2d 894 (10th Cir. 1992); Velis v. Kardanis, 949 F.2d 78 (3d Cir. 1991); In re Lucas, 924 F.2d 597 (6th Cir.), *cert denied*, 111 S. Ct. 2275 (1991); In re

Moore, 907 F.2d 1476 (4th Cir. 1990). In order to resolve the conflict among the circuits, the Court took up the issue of whether an anti-alienation restriction in an ERISA qualified plan satisfies § 541(c)(2), making the plan excludable from the debtor's bankruptcy estate. Patterson, 504 U.S. at 757, 112 S. Ct. at 2246.

The Court found the text of § 541(c)(2) to be plain and clear and found no need to consult legislative history for an interpretation. Section 541(c)(2) provides:

> A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable non-bankruptcy law is enforceable in a case under this title.

(Emphasis added.) Patterson, 504 U.S. at 757, 112 S. Ct. at 2246. The Court focused on the phrase "applicable non-bankruptcy law" and found that applicable non-bankruptcy law includes federal law as well as state law. Id. Accordingly, the Court held that a spendthrift trust created pursuant to federal law can be excluded from the bankruptcy estate under § 541(c)(2). Id.

As a next step in resolving the issue, the Court considered whether the anti-alienation provision in ERISA satisfied the transfer restriction of § 541(c)(2). In so doing, the Court asked whether the anti-alienation clause contained in the ERISA qualified plan at issue satisfied the literal terms of § 541(c)(2). Id. at 759, 112 S. Ct. at 2247. In relevant part, ERISA provides:

> **(d) Assignment or alienation of plan benefits.**
> **(1) Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.**

29 U.S.C. § 1056. The Court looked at a coordinate transfer restriction of the Internal Revenue Code (I.R.C.) concerning the tax exemption of qualifying trusts and found that under 26 U.S.C. § 401(a)(3), the I.R.C. gives tax-exempt status to trust income that is not alienable or assignable under the terms of the trust. Id. at 759, 112 S. Ct. at 2247. Further, recognizing that § 541(c)(2) requires an <u>enforceable</u> transfer restriction on a debtor's interest in trust property to qualify that interest for exclusion from the estate, the Court found that ERISA's anti-

alienation provision is enforceable pursuant to 29 U.S.C. § 1132(a), thus satisfying the § 541(c)(2) enforcement requirement. Id. at 760, 112 S. Ct. at 2247-48. Finding that the plan at issue was an ERISA qualified plan, the Court concluded that:

> **[the] anti-alienation provision required for ERISA qualification and contained in the Plan at issue in this case constitutes an enforceable transfer restriction for purposes of § 541(c)(2)'s exclusion of property from the bankruptcy estate.**

Id. at 760, 112 S. Ct. at 2248.[5] The Patterson Court therefore made two findings relevant to this petition for review: that an ERISA qualified plan is excluded from property of the bankruptcy estate under § 541(c)(2), and secondly, that the plan in question was ERISA qualified and therefore excluded from the bankruptcy estate.

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5 **Although the Court did not state that an Internal Revenue Service determination of the tax exempt status of a trust is evidence of ERISA qualification, it did imply that a qualifying trust under the I.R.C. is a qualifying trust under ERISA.**

But contrary to the opinion of the court below, Patterson does not address the issue raised in this petition, namely, whether the after-tax pension fund to which the debtor has unrestricted access is entitled to the protection afforded to an ERISA qualified plan. Indeed, the plan in question in Patterson was not funded by after-tax contributions nor did it allow the debtor the right to withdraw funds from it at any time for any reason. That is, the Court did not distinguish between qualified and non-qualified plans nor define the meaning of "ERISA qualified." In re Foy, 164 B.R. 595, 597 (Bankr. S.D.Ohio 1994); In re Kaplan, 162 B.R. 684, 691 (Bankr. E.D. Pa. 1993), *aff'd* 189 B.R. 882 (E.D.Pa. 1995); In re Hall, 151 B.R. 412, 418 (Bankr. W.D. Mich. 1993). The bankruptcy court in Hall developed its own test for ERISA qualification because:

> **the Supreme Court has left undecided which types of pension plans constitute 'ERISA-qualified' plans .... While the [Patterson] court conclusively decided a major bankruptcy issue, it did not directly address what is or is not, an ERISA-qualified plan.**

In re Hall, 151 B.R. at 417.

Despite the fact that Patterson requires a fact determination of whether a plan in dispute is ERISA qualified, the courts below in this case assumed, without discussion, that all of the debtor's accounts were ERISA qualified. Those courts failed to conduct a meaningful analysis of whether the after-tax contributions in this case were in fact held in an ERISA qualified plan and whether the debtor's unrestricted access violated ERISA's anti-alienation requirement. What the courts below appear to have ultimately concluded is that if a plan's anti-alienation provision applies to only part of the dollars in a plan, or if the plan is called "ERISA qualified" by its drafters or administrators, then all of the dollars within the plan are protected from bankruptcy. This problem has not escaped the attention of some bankruptcy courts.

> **Because [Patterson] is of recent vintage, there is a paucity of case law interpreting the term "ERISA-qualified" plan. Some post-[Patterson] cases either find or seem to assume existence of an 'ERISA-qualified' plan without discussion.**

> **Only very recent decisions have begun to focus on whether a plan is "ERISA-qualified."**

In re Hall, 151 B.R. at 418 (citations omitted). Whatever lessons Patterson teaches, it in no way meant to suggest that the bankruptcy court should defer to plan administrators the determination of whether assets sought to be included in the bankruptcy estate are in an ERISA qualified plan.

B. The Ninth Circuit misapplied *Patterson*.

The Respondent cites In re Reuter, 11 F.3d 850 (9th Cir. 1993), as authoritative support for its position that all funds in the Plan are exempt from the bankruptcy estate. As is true of the Ninth Circuit's opinion below ("Barkley"), the Ninth Circuit's opinion in Reuter does not attempt to distinguish between qualified and nonqualified pension plans. Finding that Patterson made it unnecessary to analyze whether the instant plan qualified for exclusion under § 541(c)(2), the court considered only whether the plan was controlled by an ERISA anti-alienation provision. Even though participants of that plan could withdraw their own

after-tax contributions at any time, the court held that because those contributions were held in an ERISA qualified plan, the contributions were protected in bankruptcy. Id. at 852.

Reuter simply falls short in applying the Patterson decision. In determining whether a pension plan is exempt under § 541(c)(2), the Patterson Court asked not only if ERISA's anti-alienation provision constituted a restriction on transfer enforceable under applicable nonbankruptcy law, but also if the anti-alienation provision contained in the plan at issue satisfies the literal terms of section 541(c)(2) as an ERISA qualified plan. Patterson, 504 U.S. at 759, 112 S. Ct. at 2247. The Reuter court followed Patterson on the first question, but did not address the second. In saying that under Patterson, "a court need look no further than whether the ERISA-qualified plan at issue has an anti-alienation provision that satisfies the literal terms of § 541(c)(2),"[6] Reuter failed to properly analyze whether a participant's direct control of after-tax

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6 Reuter, 11 F.3d at 852.

contributions disqualified those plan funds under ERISA before concluding that § 541(c)(2) had been satisfied. The Ninth Circuit's analysis in Barkley and Reuter is therefore incomplete and incorrect.

After Patterson was decided, some lower federal courts confronted the issue of whether the pension plans under consideration qualified under ERISA on grounds other than alienability. One court, finding that the plan in question was not ERISA qualified because the debtor was the sole participant and the sole shareholder of the employer corporation, looked to state law to determine whether the plan's spendthrift provision satisfied § 541(c)(2). In re Acosta, 182 B.R. 561 (N.D. Cal. 1995). Another court found that the employer contributions to an ERISA qualified plan were not valid contributions and thus not subject to ERISA's anti-alienation provision. In re Bell & Beckwith, 5 F.3d 150, 153 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 1060 (1994). It therefore refused to use ERISA to shield those assets from the

reach of the bankruptcy trustee. Id.; *see also* In re McClellan, 152 B.R. 252, 257 (Bankr. C.D. Ill. 1993), (question for the court not whether plan was ERISA qualified but whether debtor's right to control and terminate plan violated the anti-alienation requirement of § 541(c)(2)), *aff'd*, 162 B.R. 525 (C.D.Ill. 1993), *judgment rev.*, 45 F.3d 432 (7th Cir. 1995). The question that needs to be addressed in this case, but that was not by the courts below, is whether a debtor's unlimited access to after-tax contributions violates ERISA, thus making the ERISA anti-alienation provision inapplicable to the § 541(c)(2) analysis.

C. The contested funds are not part of an ERISA qualified plan.

Both the fact that the participant funds this account with after-tax dollars and has unrestricted access to the account militate against finding the funds at issue in this case part of an ERISA qualified plan. As to the after-tax contributions, the Plan operates more like an IRA or Keogh savings account, which is not excluded from the bankruptcy

estate under § 541(c)(2), because only the income generated by the after-tax dollars is tax sheltered and the participant can withdraw funds from the account at any time. Patterson, 504 U.S. at 762-63, 112 S. Ct. at 2249 (debtor's interest in individual retirement accounts not excludable under § 541(c)(2) "because the plans lack transfer restrictions enforceable under 'applicable nonbankruptcy law'"); In re Caslavka, 179 B.R. 141, 143 (Bankr. N.D. Iowa 1995); In re Lane, 149 B.R. 760, 766 (Bankr. E.D. N.Y. 1993).

More dispositive of the question of whether these after-tax contributions are part of an ERISA qualified plan, however, is that ERISA contains a provision that restricts the participant's ability to access plan assets. Under 29 U.S.C. § 1056(d)(2), a participant may only borrow money from the plan as provided in this subsection, and "a loan made to a participant . . . shall not be treated as an assignment or alienation if such loan is secured by the participant's accrued nonforfeitable benefit and is exempt from the tax imposed by"

sections of the I.R.C. (Emphasis added). By negative implication, any other withdrawal by a participant is treated as an assignment or alienation and violates the anti-alienation clause of § 1056(d)(1). If § 1056(d)(2) is construed as a prohibition against a participant's withdrawal of plan funds, the 1988 Plan amendment giving participants unlimited access to after-tax contributions violates ERISA and renders those funds not qualified under ERISA. In addition, because after-tax dollars are not subject to any tax exemption of the I.R.C., the after-tax contributions in the Plan fall outside the kinds of contributions contemplated in ERISA. These assets, therefore, are not part of an ERISA qualified plan.

Finally, in bankruptcy, the Trustee assumes the rights and powers of the debtor. 11 U.S.C. § 544(a). Under §§ 541, 542, 543 and 704(1) of the Bankruptcy Code, the Trustee is empowered to collect property of the estate and demand turnover of estate property from other entities and custodians, including property held by non-ERISA qualifying plan

trustees. In the present case, the Trustee seeks to exercise the same rights Conners may exercise with respect to funds contained in their after-tax account. Because no restrictions have been placed on Conners' ability to obtain their after-tax contributions, the Trustee should not have impaired rights to obtain those funds on behalf of the bankruptcy estate and its creditors.

III. The Court should grant certiorari to define "ERISA qualified."

Petitioner urges the Court to clarify which factors qualify a plan under ERISA. In the absence of useful guidelines, courts will devise their own tests or, as did the courts below, apply no test at all to determine whether assets are in an ERISA qualified plan.

Although it uses the term "ERISA qualified," the Patterson Court does not define it. As used in Patterson, the Court could have meant: "(1) a plan subject to ERISA, (2) a plan that is both qualified under IRC Section 401(a) and subject to ERISA, or (3) a plan subject to ERISA that

expressly contains the language required under Section 206(d) of ERISA." J. Gordon Christy and Sabrina Skeldon, "*Schumate* and Pension Benefits in Bankruptcy," 2 J. BANKR. L. & PRAC. 719, 725 (1992). Lack of a uniform definition is expected to lead to inconsistent results. Id.

The Sixth Circuit requires a plan to meet three criteria for ERISA qualification: The plan (1) must be tax qualified under I.R.C. § 401(a), (2) subject to ERISA, and (3) must contain an anti-alienation clause as set forth in 29 U.S.C. § 1056(d)(1). In re Hall, 151 B.R. at 419; In re Nolan, 175 B.R. 214, 217-18 (Bankr. N.D.Ohio 1994). The Nolan court required that the plan in question satisfy each requirement to be considered ERISA qualified for exclusion from the bankruptcy estate pursuant to § 541(c)(2). The bankruptcy court in In re Orkin, 170 B.R. 751, 754 (Bankr. D. Mass. 1994), also found "the best view to be that a plan is 'ERISA qualified' only when it complies with the requirements of both ERISA and the IRC." Under this test, after-tax contributions

would not be ERISA qualified because they are not subject to the I.R.C. tax qualification rules and thus not tax qualified. Indeed, "ERISA qualified" may have no meaning at all to plans consisting of after-tax contributions. *But see*, In re Hanes, 162 B.R. 733, 740 (Bankr. E.D. Va. 1994), where the court did not require a plan to be tax qualified to be ERISA qualified.

Defining the meaning of "ERISA qualified" will help bankruptcy courts and trustees in determining how much control over plan assets a debtor may have without putting those assets at risk in bankruptcy. This issue comes up regularly in bankruptcy cases, forcing the courts to devise their own tests tailored to the facts of the case. In a pre-Patterson decision, a Ninth Circuit bankruptcy court held that a debtor who had unrestricted access to ERISA funds through prepetition termination of employment could not shelter those funds from bankruptcy. In re Reid, 139 B.R. 19, 21 (S.D. Cal. 1992). But that case may have been decided under state

spendthrift law rather than under ERISA as propounded in Patterson. A more recent case from another circuit, however, cites Reid in support of the proposition that:

> [o]nce a debtor gains unrestricted access to funds in an ERISA-qualified plan, such funds do not qualify as a spendthrift trust under § 541(c)(2) and thus are not excludable from the estate.

In re Caslavska, 179 B.R. at 143. It is unclear whether the Caslavska court would consider merely the right to withdraw funds from a plan enough to disqualify the plan under ERISA or whether the right must first be exercised. *See* In re Holst, 192 B.R. 194, 199 (Bankr. N.D. Iowa 1996). In another bankruptcy case, the bankruptcy court held that the debtor's right to control the plan, rather than its beneficial interest in the plan, brought the plan within the reach of the bankruptcy trustee. In re McClellan, 152 B.R. at 255. None of these cases provide any guidance for deciding that proverbial "next case."

Perhaps most worrisome about the lack of a uniform definition of "ERISA qualified" is the potential that court decisions will thwart the Bankruptcy Code from

accomplishing its objectives. On the one hand, ensuring the security of pension benefits even for bankruptcy debtors is an acknowledged goal of ERISA. Patterson, 504 U.S. at 764-65, 112 S. Ct. at 2250. But ERISA cannot guarantee that pension benefits will be available when they are needed in retirement if the beneficiary can remove them at any time for a purpose other than retirement. A plan that gives the debtor unlimited access to funds fails to serve an important ERISA objective; protecting those funds in bankruptcy cannot be justified by this policy goal.

On the other hand, bankruptcy was not designed to allow debtors an opportunity to shelter assets beyond those needed for making a fresh start. Under § 541(a) of the Bankruptcy Code, all property of the debtor is included in the bankruptcy estate, including property that may be claimed as exempt or excluded under the Code. 3 NORTON BANKRUPTCY LAW & PRACTICE § 51:2, at 51-7 (1994). This gives the court the duty and authority to determine which property may be

exempted under the various Code provisions. Id. If a rule induces courts to blindly declare, without looking at the particulars, that all of a debtor's property purported to be held in an ERISA qualified plan is excludable from the bankruptcy estate, the Code objectives will be undermined, and once again form will prevail over substance. If bankruptcy abuses are to be averted, courts must be encouraged to closely scrutinize the legitimacy of exclusion or exemption claims. In this case, the courts below completely abdicated their responsibility to carefully determine whether the debtor's property was held in an ERISA qualified account before ruling that the property was excluded from the estate under § 541(c)(2). The Petitioner asks this Court to both rectify a wrong result and to clarify for the future what property is properly excluded from the bankruptcy estate as part of an ERISA qualified plan.

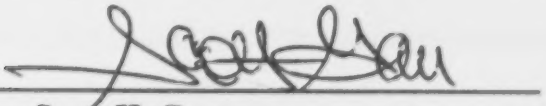
V. Conclusion.

The Petitioner urges the Court to grant this Writ for

Certiorari and to define the meaning of "ERISA qualified" for purposes of bankruptcy. The Petitioner argues that after-tax contributions to a pension plan are not in an ERISA qualified plan when the debtor has unrestricted access to them. In so arguing, the Petitioner asks this Court to reverse the Ninth Circuit Court of Appeals in holding that such funds were ERISA qualified and therefore excluded from the bankruptcy estate under § 541(c)(2).

Respectfully submitted,

MESCH, CLARK & ROTHSCHILD, P.C.

By 

Scott H. Gan
Attorney for Petitioner

APPENDIX

E X H I B I T 1

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF ARIZONA

In re:	Chapter 7
WALKER S. CONNER & JANICE M. CONNER,	No. 91-01549-TUC-LO
	Adv. No. 92-0249
Debtors.	MINUTE ENTRY ORDER

The Chapter 7 trustee brought a motion for turnover claiming that certain contributions made by Janice Conner to a 401k Plan were property of the estate. The matter was than set up as an adversary proceeding. There are no factual disputes and the Court can then treat this like a motion for summary judgment.

The parties have filed numerous memorandum. The central issue is whether Janice Conner's contributions to what has been referred to as the "after-tax account" are excepted from property of the estate under Code section 541(c)(2). The parties

dispute the legal application of the Supreme Court's decision in Patterson v. Shumate, ___ U.S. ___, 112 S.Ct. 2242, 119 L.Ed.2d 519 (1992), and subsequent Ninth Circuit case law. The Court has reviewed all the pertinent case law, all the pleadings and has considered the arguments of counsel. The Court holds that Paterson is controlling in this case. The debtors' interest in The Orthopedic Clinic 401k Profit Sharing and Thrift Plan and Trust Agreement is excepted from property of the estate. This includes Janice Connor's interest in the "after-tax account." Based on this, and good cause appearing,

IT IS HEREBY ORDERED that the trustee's motion is denied.

DATED AT TUCSON, ARIZONA this 1st day of April, 1993.

/s/
LAWRENCE OLLASON
UNITED STATES BANKRUPTCY JUDGE

Copy of the foregoing mailed this 6th day of April, 1993, to:

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_____

Deputy Clerk (tjf)

E X H I B I T 2

ORDERED PUBLISHED

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. AZ-93-1440-RJH
WILKER S. CONNER; JANICE M. CONNER, Debtors.	No. 91-01549-TUC-LO Adv. No. 92-0249
_____/	MINUTE ENTRY ORDER
JOHN BARKLEY, TRUSTEE, Appellant,	
v.	OPINION
WILKER S. CONNER; JANICE M. CONNER; ORTHOPEDIC CLINIC 401K PROFIT SHARING PLAN AND TRUST AGREEMENT; PUREGRO COMPANY, Appellees.	
_____/	

Argued on February 24, 1994

at Tucson, Arizona

Submitted on March 7, 1994

Filed - APR 29, 1994

Appeal from the United States Bankruptcy Court
for the District of Arizona

Honorable Lawrence Ollason, Bankruptcy Judge
Presiding

Before: RUSSELL JONES, and HAGAN, Bankruptcy Judges

RUSSELL, Bankruptcy Judge:

This appeal arises from a bankruptcy court's order denying the Chapter 7[1] trustee's motion for turnover of the debtor's interest in an employer's profit sharing and pension plan. The Chapter 7 trustee appeals. We AFFIRM.

I. FACTS

---

[1]Unless otherwise indicated, all Chapter, Section and Rule references are to the Bankruptcy Code, 11 U.S. C. §§ 101 et seq. and to the Federal Rules of Bankruptcy Procedure, Rules 1001 et seq.

The debtors, Wilker and Janice Conner, ("Conners"), filed their Chapter 7 petition on May 2, 1991. The Conners claimed Janice Conner's interest in her pension and profit sharing plan ("plan") maintained by her employer, the Orthopedic Clinic ("Clinic"), was excluded from property of their estate pursuant to § 541(c)(2).

In 1980, the Clinic established an ERISA-qualified[2] 401(k) profit sharing plan. Since January 1, 1987, funding for the plan included: (1) employer contributions; (2) employer matching contributions; (3) employee pre-tax dollar contributions; (4) employee after-tax dollar contributions (not permitted after 1/1/87); and (4) employee rollover contributions.

The plan also contained an anti-alienation provision:

> "Except as provided under Section 8.9 [plan loans], the interest herein, whether vested or

---

[2]Employee Retirement Income Security Act of 1974 as codified in 29 U.S.C. §§ 1001 et. seq.

not, of any Participant or Beneficiary, shall not be subject to alienation, assignment, encumbrance, attachment, garnishment, execution, sequestration or other legal or equitable process, or transferability by operation of law in the event of bankruptcy, insolvency or otherwise ."

The property at issue is the employee after-tax dollar contributions as described in paragraph (4) above ("after-tax account"). In 1988, the Clinic modified the plan and a document was issued to plan participants summarizing the changes. The document of changes stated that the funds in the after-tax account could be withdrawn at any time and for any reason.

The Chapter 7 trustee, John Barkley ("trustee"), instituted this adversary proceeding to require turnover of the after-tax contributions which, at the time of the Conners' bankruptcy filling, were worth approximately $38,000. The trustee did not assert an interest in any other

portion of the plan.

The bankruptcy court denied the trustee's request, holding that Patterson v. Shumate, 504 U.S. ___, 112 S.Ct. 2242, 119 L.Ed.2d 519 (1992), controlled and therefore, the Conners' interest in the plan, including the after-tax account, was excepted from property of the estate. The trustee timely filed a notice of appeal.

II. ISSUE

Whether the Conners' after-tax dollar contributions to their employer's ERISA-qualified plan is excluded as property of the estate pursuant to § 541(c)(2).

III. STANDARD OF REVIEW

A bankruptcy court's conclusions of law are reviewed de novo. In re Bronner, 135 B.R. 645, 646 (9th Cir. BAP 1992). Mixed questions of law and fact are also reviewed de novo. Boone v. United States 944 F.2d 1489, 1492 (9th Cir. 1991).

IV. DISCUSSION

A bankruptcy estate is comprised of "all legal or

equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). Section 541(c)(2), however, creates an exception. An interest in property is excluded from the estate if it contains "[a] restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law . . . ." 11 U.S.C. § 541(c)(2).

Recently, the Supreme Court in Patterson v. Shumate, resolved a conflict among the circuits regarding § 541(c)(2), holding that a pension plan under ERISA which contains an anti-alienation provision constitutes, for purposes of § 541(c)(2), a restriction enforceable under "applicable nonbankruptcy law." 504 U.S. ___, ___, 112 S.Ct. 2242, 2248, 119 L.Ed.2d 519, 528 (1992). Since the trustee concedes in his opening brief that "the funds at issue [after-tax dollar contributions] are part of an overall 'ERISA-qualified' plan . . . ," the Conners' entire ERISA plan should be excluded from the estate under Shumate's interpretation of § 541(c)(2).

The trustee, however, contends that the after-tax account does not have the requisite restrictions and therefore, Shumate is inapplicable to this account. The trustee asserts that even after Shumate, control is still a relevant inquiry. Since the Conners have the ability to withdraw the after-tax contributions at any time, the trustee believes these contributions should be property of the estate. We disagree.

Control over the funds was not at issue in Shumate. The Court held that an ERISA-qualified plan which contains an anti-alienation provision "constitutes an enforceable transfer restriction for purpose of § 541(c)(2) exclusion of property from the bankruptcy estate." Shumate, 504 U.S. at ___, 112 S.Ct. at 2248, 119 L.Ed.2d at 528. The Court did not distinguish between ERISA-qualified plans where the debtor did not distinguish between ERISA-qualified plans where the debtor did or did not have control. Moreover, as the circuit noted in Shumate v. Patterson, 943 F.2d 362, 363 (4th Cir. 1991), aff'd,

Patterson v. Shumate, 504 U.S. ___, 112 S.Ct. 2242, 119 L.Ed.2d 519 (1992), the debtor controlled ninety-six percent of the voting stock and therefore could technically terminate the plan at will.

Furthermore, in In re Reutar, 11 F.3d 850 (9th Cir. 1993), the Ninth Circuit recently held that voluntary contributions by an employee/debtor to an ERISA-qualified plan, which could be withdrawn at any time by the employee/debtor, qualified for exclusion pursuant to § 541(c)(2). Id. at 853.

In Reutar, the debtor's employer provided to its employees a pension and profit sharing plan that satisfied the ERISA requirements and contained an anti-alienation provision. Id. at 851. Under the plan, a participant could also contribute up to six dollars a week personally and could withdraw these contributions at any time. Id. The Ninth Circuit stated that "[u]nder Shumate, a court need look no further than whether the ERISA-qualified plan at issue has an anti-alienation provision . . . ." Id. at 852.

Therefore, the Court held that the entire plan qualified for exclusion, under § 541(c)(2), as an ERISA-qualified pension plan. Id. at 853.

Since it is undisputed that this is an ERISA-qualified plan with an anti-alienation provision, we hold that the entire plan, including the employee after-tax contributions, qualifies under the § 541(c)(2) standards articulated in Shumate.

V. CONCLUSION

The bankruptcy court properly concluded that the Conners' interest in their after-tax contributions to their employer's ERISA-qualified plan is excluded from property of the Conners' estate pursuant to § 541(c)(2).

JONES, concurring:

In Patterson v. Shumate, the Supreme Court established a two-prong test for determining whether pension benefits in an ERISA-qualified plan are excluded from property of the estate under applicable nonbankruptcy law pursuant to 11 U.S.C. § 541(c)(2). Patterson v.

Shumate, 504 U.S. ___, ___, 112 S.Ct. 2242, 2247-48, 119 L.Ed.2d 519, 527-28 (1992). First, a court must evaluate whether the ERISA-qualified plan contains an anti-alienation provision which constitutes a restriction on _____ that is enforceable under nonbankruptcy law within the plain meaning of section 541(c)(2). Id. Under this first prong, the Supreme Court in Shumate resolved a conflict in the circuits in holding that "applicable nonbankruptcy law" is not limited to state law. 112 S.Ct. at 2246-48, 119 L.Ed.2d at 526-28.

The second step in the analysis posited by the Shumate Court is to determine whether the anti-alienation provision contained in an ERISA-qualified plan satisfies the terms of section 541(c)(2). Shumate, 112 S.Ct. at 2248, 119 L.Ed.2d at 528. In the instant appeal it is undisputed that the Debtor has access to the funds in the after-tax account at any time and for any reason. Therefore, the Debtor may be unable to satisfy the second prong of the Shumate analysis which entails subjecting the anti-

alienation provision to scrutiny under section 541(c)(2).

However, since this panel is obligated to follow controlling authority on this issue, in re Reuter, 11 F.3d 850 (9th Cir. 1993), I respectfully concur.

E X H I B I T 3

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

_____/

In re: WILKER S. & JANICE M. CONNER,

Debtor.

_____/

JOHN BARKLEY, Trustee,

Appellant,

v.

WILKER S. CONNER; JANICE M. CONNER; ORTHOPEDIC CLINIC 401K PROFIT SHARING PLAN AND TRUST AGREEMENT, PUREGRO COMPANY,

Appellees.

_____/

No. 41-16001

BAP No. AZ-93-1440-RJH

OPINION

Appeal from a Decision of the Bankruptcy Appellate Panel

Bankruptcy Appellate Panel

Barry Russell, Alfred C. Hagan, & Robert C. Jones

Submitted November 15, 1995[****]

San Francisco, California

Filed January 11, 1996

Before: Mary M. Schroeder and Arthur L. Alarcon, Circuit

Judges, and Owen M. Panner,[*****] District Judge.

Opinion by Judge Schroeder

SUMMARY

Bankruptcy/Personal Property/Employees

[****] The panel finds this case appropriate for submission without argument pursuant to Fed. R. App. P. 34(a) and Ninth Circuit Rule 34-4.

[*****] Honorable Owen M. Panner, Senior United States District Judge for the District of Oregon, sitting by designation.

The court of appeals affirmed a decision of the Bankruptcy Appellate Panel (BAP). The court held that a bankruptcy debtor's interest in an Employee Retirement and Income Security Act (ERISA) plan was exempted from the bankruptcy estate, regardless of the debtor's control of the assets in the plan.

The BAP affirmed a bankruptcy court order that refused to turn over to a bankruptcy estate appellee/debtor Janice Conner's interest in her pension and profit sharing plan, which was maintained by her employer. Title 11 U.S.C. § 541(c)(2) provides that interest in a trust that is subject to transfer restrictions under "applicable non-bankruptcy law" is not part of the bankruptcy estate. The BAP held that, under controlling law of the Ninth Circuit, the Conners' after tax contributions to the plan should be excluded from the estate because the plan itself was an ERISA qualified plan that had an

anti-alienation provision. In a concurring opinion in the BAP decision, however, one judge pointed out that the particular assets at issue were after tax payments to which the debtors had complete access, and which Janice could withdraw at any time.

Appellant John Barkley, the Chapter 7 trustee of the estate of appellees Wilker and Janice Conner, appealed the BAP's decision, emphasizing debtor access and control.

[1] The Supreme Court has held that the anti-alienation provision in ERISA qualified pension plans was a restriction on transfer enforceable under "applicable non-bankruptcy law." Under the Court's holding, ERISA plans are exempted from the bankruptcy estate, even though ERISA only requires restraints on alienation to third parties. The Court appeared to have discounted any distinctions based on debtors' control of their assets. Thus, the Court

has rejected the trustee's argument that a functional analysis should be conducted focusing on the debtors' control of the assets in the ERISA Plan.

COUNSEL

Michael McGrath, Mesch, Clark & Rothschild, Tucson, Arizona, for the appellant.

Ellen M. Van Riper, Kane Jorden & Von Oppenfeld, Phoenix, Arizona, for appellees Conner.

Wendy W. Woodrow, Jennings, Strouss & Salmon, Phoenix, Arizona, for the appellee.

April Pearson, Puregro/Unocal, Brea, California, for appellee Puregro Company.

OPINION

SCHROEDER, Circuit Judge:

Appellant is a Chapter 7 trustee of the estate of the debtors, Wilker and Janice Conner. The contested property is Janice Conner's interest in her pension and profit sharing plan, which is maintained by her employer, The Orthopedic Clinic. The trustee now appeals from a decision of the Bankruptcy Appellate Panel affirming a bankruptcy court order that refused to turn over the debtor's interest in the plan to the bankruptcy estate. The issue is whether the debtor's interest in the plan is exempted from the bankruptcy estate under 11 U.S.C. § 541(c)(2). That section provides that interest in a trust that is subject totransfer restrictions under "applicable non-bankruptcy law" is not part of the bankruptcy estate. 11 U.S.C. § 541(c)(2).

The BAP held that under the controlling law of this circuit, the after tax contributions of the Conners to

the plan should be excluded from the estate because the plan itself was an ERISA qualified plan that had an anti-alienation provision. See In re: *Rueter*, 11 F.3d 850 (9th Cir. 1993), *applying Paterson v. Shumate*, 112 S. Ct. 2242 (1992).

The BAP decision is published at 165 B.R. 901 (9th Cir. BAP 1994). Judge Jones filed a concurring opinion in the BAP decision, questioning the soundness of our holding in *In re: Rueter* that under *Shumate*, an ERISA plan's anti-alienation provision was sufficient to exclude the plan from the bankruptcy estate. Jones' concurrence pointed out that although the Conners' plan had an anti-alienation provision, the particular assets at issue here were after tax payments to which the debtors had complete access, and which Janice Conner could withdraw at any time.

In this appeal, the trustee emphasizes debtor access and control. He argues that because Congress intended traditional trust law principles to apply, we should hold that funds cannot be placed in trust, beyond the reach of creditors, while remaining within the control of the debtor. The trustee essentially asks us to overrule our decision in *In re: Rueter*, which is something only an en banc court can do. In *Rueter*, we held that a debtor's interest in an ERISA qualified plan was excluded from the "property of the estate," even though the plan allowed employees to withdraw their own contributions at any time and to withdraw employer contributions after two years. *See In re: Rueter*, 11 F.3d at 851. We reached that conclusion while relying upon the Supreme Court's decision in *Shumate*. *Rueter* was correctly decided.

The Supreme Court's decision in *Shumate* was prompted by a split among the circuits as to whether the anti-alienation provision in an ERISA qualified pension plan constituted a transfer restriction, enforceable under "applicable non-bankruptcy law" within the meaning of § 541(c)(2), so as to exempt ERISA plans from the bankruptcy estate. 112 S.Ct. at 2246. The issue in *Shumate* was whether the phrase "applicable non-bankruptcy law" included federal as well as state law. Our own court had held that the ERISA anti-alienation provision was not sufficient, and that the § 541(c)(2) exclusion was limited to pension plans that qualified under state law as spendthrift trusts. *In re Daniel*, 771 F.d 1352 (9th Cir.1985). In so holding, we followed the opinion in *Matter of Goff*, 706 F.2d 574 (5th Cir. 1983), which discussed the differences between a spendthrift trust

and an ERISA anti-alienation provision. In *Goff*, the Fifth Circuit explained that the policy against debtors placing their own property in revocable trust for their own benefit, and thereby exempting their property from the claims of creditors, would be subverted if ERISA plans were exempted from the bankruptcy estate. *Id.* at 588. This is true because debtors essentially control the assets in their ERISA plans; ERISA mandated restrictions only bar alienation to third parties. By contrast, spendthrift trusts are not self-settled, not freely revocable and not alienable. Thus, *Goff* reasoned, exempting a spendthrift trust from the bankruptcy estate does not allow debtors to hide their assets from creditors while still retaining the benefits of unfettered control. *Id.*

[1] The Supreme Court, however, in *Shumate*, held that the anti-alienation provision in ERISA qualified

pension plans was a restriction on transfer enforceable under "applicable non-bankruptcy law." In rejected *In re Daniel*, 771 F.2d 1352 (9th Cir. 1985) and *Matter of Goff*, 706 F.2d 574 (5th Cir. 1983). 112 S.Ct at 2248. Thus, under *Shumate*, ERISA plans are exempted from the bankruptcy estate, even though ERISA only requires restraints on alienation to third parties. In interpreting the § 541(c)(2) exemption to cover ERISA plans, the Supreme Court appears to have discounted any distinctions based on the debtors' control of their assets. Thus, the appellant's argument that we should conduct a functional analysis focusing on the debtors' control of the assets in the ERISA Plan has been rejected by the Supreme Court.

We therefore AFFIRM the BAP.

AFFIRMED.

E X H I B I T 4

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED FEB. 27 1996

Cathy A. Catterson Clerk

U.S. Court of Appeals

In Re:

WILKER S. & JANICE M. CONNER,

Debtors,

No. 94-16001

BAP No. AZ-93-1440-RJH

JOHN BARKLEY, Trustee,

Appellant,

v.

WILKER S. CONNER; JANICE M. CONNER; ORTHOPEDIC CLINIC 401K PROFIT SHARING PLAN AND TRUST AGREEMENT; PUREGRO COMPANY,

Appellees.

ORDER

Before: SCHROEDER and ALARCON, Circuit Judges, and PANNER, **

District Court Judge

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

**Honorable Owen M. Panner, Senior United States District Judge for the District of Oregon, sitting by designation.

EXHIBIT 5

THE ORTHOPEDIC CLINIC 401(k) PROFIT SHARING THRIFT PLAN AND TRUST AGREEMENT

As Amended and Restated Effective January 1, 1987

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ARTICLE 1
PURPOSE

THIS PLAN AND TRUST AGREEMENT is made and entered into by and between The Orthopedic Clinic, an Arizona association, hereinafter referred to as "Employer," the Northern Trust Bank of Arizona, N.A., as Trustee of all assets not held in segregated Accounts under Section 11.5, and Robert E. White, Norman F. Fee, M.D., Anthony T. Yeung, M.D., as Trustees of their respective Directed Investment Accounts established in accordance with Section 11.5.

The amended and restated Plan and Trust set forth in this Agreement shall be designated as The Orthopedic Clinic 401(k) Profit Sharing Thrift Plan and Trust Agreement. The original plan was established on January 1, 1980 and restated effective as of January 1, 1984. The Plan as in effect on December 31, 1986, is hereinafter referred to as the "Superseded Plan".

The Plan and Trust, as amended, are intended to qualify under Sections 401(a) and 501(a) of the Internal

Revenue Code of 1986, as amended, and are continued and maintained for the exclusive benefit of Eligible Employees of the Employer and their Beneficiaries to enable them to share in the Employer's profits, to provide retirement income, and to provide accident and health benefits in the event of Disability.

Nothing in the Plan or Trust shall be deemed a contract between the Employer and any Employee, nor shall the rights or obligations of the Employer or any Employee to continue or terminate Employment at any time be affected hereby.

All matters respecting the validity, effect, interpretation and administration of this Trust Agreement shall be determined in accordance with the laws of the State of Arizona, except where pre-empted by ERISA or other Federal statutes.

Wherever appropriate, words used herein in the singular may include the plural or the plural may be read as singular, and the masculine may include the feminine.

The conversion of the prior Plan and Trust to this amended and restated Plan and Trust was continuous and

no gap either in time or effect exists between them or ever shall be construed to so exist.

The provisions of this Plan shall apply only to an Employee who terminated Employment on or after January 1, 1987. The rights and benefits, if any, of a former Employee shall be determined in accordance with prior provisions of the Plan in effect on the date his Employment terminated, provided that the provisions of Article 8 shall govern the distribution of benefits to all former Employees.

ARTICLE 2

DEFINITIONS AND CONSTRUCTION

2.1 Account

"Account" means the aggregate of all records maintained by the Committee for purposes of determining a Participant's or Beneficiary's interest in the Trust Fund and shall include the Employer Account, Pre-tax Account, Rollover Account, Suspense Account After-Tax Account, and Trustee to Trustee Transfer Account as defined below.

A. "Employer Account" means that portion of a Participant's Account attributable to Employer Contributions, as adjusted by such other amounts properly credited or debited to such Account. The term "Employer Account" includes Profit Sharing Accounts and Matching Accounts. "Profit Sharing Account" means that portion of a Participant's Account attributable to Profit Sharing Contributions and "Matching Account" means that portion of a Participant's Account attributable to Matching Contributions.

B. "Pre-Tax Account" means that portion of an Account attributable to Participant Pre-Tax Contributions,

as adjusted by such other amounts properly credited or debited to such Account.

C. "Rollover Account" means that portion of an account attributable to Participant Rollover Contributions, as adjusted by such other amounts properly credited or debited to such Account.

D. "Suspense Account" means an Account established to hold Contributions which are in excess of the maximum amount allowed as Annual Additions until such Contributions can be allocated to Participants' Accounts.

E. "After-Tax Account" means that portion of an Account attributable to Participant After-Tax Contributions, as adjusted by such other amounts properly credited or debited to such Account.

F. "Trustee to Trustee Transfer Account" means that portion of an Account attributable to a Trustee to Trustee Transfer made on behalf of the Participant under Section 12.7, as adjusted by such other amounts properly credited or debited to such Account.

2.2 Active Participant

"Active Participant" is defined in Section 5.1.

2.3 After-Tax Contributions

"After-Tax Contributions" means the aggregate of a Participant's Contributions which are not deductible for Federal income tax purposes.

2.4 Aggregation Group

For purposes of Code Section 416(g), "Aggregation Group" means all plans of the Employer in which a Key Employee is a Participant and each other Plan of the Employer which enables any Plan in which a Key Employee is a Participant to meet the requirements of Code Sections 401(a) or 410. The Employer may include other plans in the Aggregation Group if the group will continue to satisfy the requirements of Code Sections 401(a) and 410.

2.5 Anniversary Date

"Anniversary Date" means the last day of the Plan Year.

2.6 Annual Addition

"Annual Addition" is defined in Section 5.3.

2.7 Annuity Starting Date

"Annuity Starting Date" means (A) the first day of the first period for which an amount is received as an annuity or (B) in the case of a benefit not payable in the form of an

annuity, the first day on which all events have occurred which entitle the Participant to such benefit.

2.8 Authorized Leave of Absence

"Authorized Leave of Absence" means any absence authorized by the Employer under the Employer's standard personnel practices provided that all persons under similar circumstances must be treated alike in the granting of such Authorized Leave of Absence and provided further that the Employee returns to active Employment or retires within the period of authorized absence. An absence due to service in the Armed Forces of the United States shall be considered an Authorized Leave of Absence provided that the Employee returns to Employment with the Employer within the time period provided by law.

2.9 Beneficiary

"Beneficiary" is defined in Section 8.4.

2.10 Board of Directors

"Board of Directors" means the Board of Directors of The Orthopedic Clinic.

2.11 Break in Service

"Break in Service" means any Plan Year during which an Employee or a Participant is not credited with more than

500 Hours of Service in such Plan Year for any reason other than an Authorized Leave of Absence. However, a Break in Service shall occur only if the Employee or Participant is not Employed on the last day of the Eligibility Computation Period or Plan Year, whichever is applicable, or fails to return to the Employ of the Employer within a reasonable period of time after the end of an Authorized Leave of Absence. For all purposes, a Participant shall be deemed to incur a Break in Service on the last day of the Plan Year.

2.12 Code

"Code" means the Internal Revenue Code of 1986, as amended from time to time.

2.13 Committee

"Committee" means the administrative Committee designated under Article 9.

2.14 Total Compensation / Plan Compensation / 415 Compensation

A. "Total Compensation" shall mean 415 Compensation plus any Employer contribution under a qualified cash or deferred arrangement to the extent not included in gross income under Code Section 402(a)(8) or 402(h)(1)(B), any amount which the Employee would have

received in cash but for an election under a cafeteria plan within the meaning of Code Section 125 and any amount contributed to an annuity contract described in Code Section 403(b) pursuant to a salary reduction agreement within the meaning of Code Section 3121(a)(5)(D).

B. "Plan Compensation" means the Total Compensation paid by the Employer to a Participant while he is an Eligible Employee for personal services rendered during a Plan Year or such lesser amount as the Participant may elect under Section 2.14(E).

C. "415 Compensation" means all regular wages paid to a Participant by the Employer during a Plan Year including bonuses, overtime and other special wages but excluding:

1. Any Employer contribution under a qualified cash or deferred arrangement to the extent not included in gross income under Code Section 402(a)(8) or 402(h)(1)(B), any amount which the Employee would have received in cash but for an election under a cafeteria plan within the meaning of Code Section 125 and any amount contributed to

an annuity contract described in Code Section 403(b) pursuant to a salary reduction agreement within the meaning of Code Section 3121(a)(5)(D);

2. Employer contributions under this Plan or any other qualified plan which are not included in the Employee's gross income for the taxable year in which contributed or which are Employer contributions under a simplified Employee pension plan to the extent they are deductible by the Employee, or distributions from any qualified Plan;

3. Amounts realized from the exercise of a nonqualified stock option, or when restricted stock (or property) held by the Employee, either becomes freely transferrable, or is no longer subject to a substantial risk of forfeiture;

4. Amounts realized from the sale, exchange or other disposition of stock acquired under a qualified stock option;

5. Other amounts which receive special tax benefits (whether or not the amounts are actually excludable from the gross income of the Employee);

6. Directors fees; and

7. Payments made by the Employer for group insurance, hospitalization or similar benefits.

D. A Participant who is an officer, shareholder or a highly compensated Employee, (i.e., an Employee whose annual Plan Compensation exceeds $25,000), may elect to limit Plan Compensation for any Plan Year to an amount which is less than his actual Plan Compensation, provided the election (1) may not be revoked retroactively and (2) is made no later than 2-1/2 months after the end of the Plan Year.

E. For all purposes of the Plan except the determination of the 10% limitation on After-Tax Contributions and the amount of such contributions to be treated as Annual Additions, Plan Compensation and 415 Compensation shall be limited to $200,000 or, for Plan Years beginning on or after January 1, 1988, such greater dollar amount as may be prescribed by the Secretary of the

Treasury under Code Section 416(d)(2). The new dollar limitation for a calendar year shall apply for all Plan Years ending with or within such calendar year.

2.15 Contribution

"Contribution" means an Employer or Participant Contribution as set forth in Article 4.

2.16 Determination Date

"Determination Date" means the last day of the first Plan Year and, with respect to any subsequent Plan Year, the last day of the preceding Plan Year.

2.17 Disability

"Disability" means the permanent incapacity of a Participant, by reason of physical or mental illness, to perform his usual duties for the Employer, resulting in termination of his service with the Employer. Disability shall be determined by the Committee in a uniform and nondiscriminatory manner after consideration of such evidence as it may require, which shall include a report of such physician or physicians as it may designate.

2.18 Earliest Retirement Age

"Earliest Retirement Age" means the earliest date on which, under the Plan, the Participant could elect to receive retirement benefits.

2.19 Early Retirement Date

"Early Retirement Date" means the date a Participant attains age 55.

2.20 Effective Date

"Effective Date" means January 1, 1980. The provisions of this restated Plan shall be effective January 1, 1987.

2.21 Employee/Leased Employee

A. "Employee" means any person who, on or after the Effective Date, is receiving remuneration for personal services rendered to the Employer (or who would be receiving such remuneration except for an Authorized Leave of Absence). The term "Employee" as used herein includes both "Eligible Employees" and "Ineligible Employees" as defined in Section 3.1.

B. "Leased Employee" means any person (other than an Employee of the Employer) who pursuant to an agreement between the Employer and any other person ("leasing organization") has performed services for the

Employer (or for the Employer and related persons determined in accordance with Code Section 414(n)(6)) on a substantially full-time basis for a period of at least one year (six months in the case of core health benefits on and after January 1, 1987) and such services are of a type historically performed by employees in the business field of the Employer. For services rendered:

1. Prior to January 1, 1987, all Leased Employees shall be treated as Employees of the Employer unless they are covered by a money purchase pension plan providing: (1) a non-integrated Employer contribution rate of at least 7.5% of compensation, (2) immediate participation, and (3) full and immediate vesting;

2. On and after January 1, 1987, all Leased Employees shall be treated as Employees of the Employer unless the Leased Employees do not constitute more than 20% of the Employer's Non-Highly Compensated Workforce and unless such Leased Employees are covered by a money purchase pension

plan providing: (1) a non-integrated Employer contribution rate of at least 10% of compensation, (2) immediate participation, and (3) full and immediate vesting.

If a Leased Employee is treated as an Employee, contributions or benefits provided by the leasing organization which are attributable to services performed for the Employer shall be treated as provided by the Employer.

C. "Non-Highly Compensated Work Force" means the aggregate number of Employees and Leased Employees who have performed services for the Employer, or any other member of the Related Group, on a substantially full-time basis for at least one year. "Non-Highly Compensated Work Force," as defined above, excludes any individuals who are Highly Compensated Employees.

2.22 Employer

"Employer" means The Orthopedic Clinic, or its successor or successors which agree to continue the Plan, and any subsidiaries or affiliates which adopt the Plan with the consent of The Orthopedic Clinic.

2.23 Employment/Employ/Employed

"Employment," "Employ," and "Employed" means employment by the Employer. The terms "Re-Employment," "Re-Employ" and "Re-Employed" also refer to employment by the Employer.

2.24 Employment Commencement Date

"Employment Commencement Date" means the date on which an Employee first performs an Hour of Service for the Employer. In the event an Employee, or a Participant, incurs a Break in Service, Employment Commencement Date means the first date on which an Employee is required to be credited with an Hour of Service following the last day of the Plan Year in which the Break in Service occurs.

2.25 Entry Date

"Entry Date" means January 1.

2.26 ERISA

"ERISA" means the Employee Retirement Income Security Act of 1974, as amended from time to time.

2.27 Excess Compensation

"Excess Compensation" means that portion of a Participant's Plan Compensation which exceeds the Taxable Wage Base in effect on the first day of the Plan Year.

2.28 Five-Percent Owner

"Five-Percent Owner" means any person who owns (or is considered as owning within the meaning of Code Section 318) more than five percent (5%) of the outstanding stock of the Employer or stock possessing more than five percent (5%) of the total combined voting power of all stock of the Employer or, in the case of an unincorporated business, any person who owns more than five percent (5%) of the capital or profits interest in the Employer. In determining percentage ownership hereunder, Employers that would otherwise be aggregated under Code Sections 414(b), 414(c) and 414(m) shall be treated as separate Employers.

2.29 Forfeiture

"Forfeiture" means a nonvested amount arising pursuant to the provisions of Article 6.

2.30 Highly Compensated Employee

"Highly Compensated Employee" means any Employee who during the Plan Year or the preceding Plan Year:

A. Was at any time a Five-Percent Owner,

B. Received Total Compensation from the Employer in excess of $75,000,

C. Received Total Compensation from the Employer in excess of $50,000 and was in the Top-Paid Group of Employees for such Plan Year, or

D. Was at any time an officer of the Employer and received Total Compensation greater than 150% of the amount in effect under Code Section 415(c)(1)(A) for such Plan Year, and

E. Meets such other requirements as set forth in Code Section 414(q) and any regulations issued under that section.

2.31 Hour of Service

A. "Hour of Service" means:

1. Each hour for which an Employee is paid, or entitled to payment, for the performance of duties for the Employer.

2. Each hour for which an Employee is paid, or entitled to payment, by the Employer on account of a period of time during which no duties are performed (regardless of whether the Employment relationship has terminated) due to vacation, holiday, illness, incapacity (including Disability), layoff, jury duty,

military duty or leave of absence, provided that no Hours of Service shall be credited to an Employee:

a. For a period during which no duties are performed, but payment is made or due under a plan maintained solely for purpose of complying with applicable worker's compensation, unemployment compensation or disability insurance laws;

b. On account of any payment made or due an Employee solely as reimbursement for medical or medically related expenses incurred by the Employee.

3. Each hour not otherwise credited under the Plan for which back pay, irrespective of mitigation of damages, has either been awarded or agreed to by the Employer. Such hours are to be credited to the period or periods to which the award or agreement pertains. If this provision results in an

Employee becoming an Active Participant for a Plan Year in which he was not otherwise an Active Participant under Article 5, or if this provision results in an increase in the vested percentage applicable to an Account which has been forfeited under Article 6, the Committee shall establish equitable procedures for determining and allocating any resulting amounts to such Employee's account.

B. No more than 501 Hours of Service shall be credited under paragraphs A(2) and A(3) to an Employee on account of any single continuous period of time during which the Employee performs no duties for the Employer.

C. During a Qualified Maternity or Paternity Leave, an Employee shall be credited with Hours of Service at the rate the Employee normally would have earned Hours of Service but for the Qualified Maternity or Paternity Leave. Hours of Service credited with respect to a Qualified Maternity or Paternity Leave shall be credited solely for the purpose of determining whether a one-year Break in Service has occurred. Accordingly, only the first 501 Hours of Service

of such leave shall be credited under this paragraph. The Hours of Service credited for this purpose shall be credited to the Computation Period in which the leave begins, if necessary, to avoid a Break in Service for that period. If the Hours of Service are not necessary to prevent a one-year Break in Service in the Computation Period in which the leave begins, the hours shall be credited to the Computation Period immediately following the period in which the leave began. "Qualified Maternity or Paternity Leave" means an absence from work commencing on or after January 1, 1985, by reason of (1) the pregnancy of the Employee, (2) the birth of a child of the Employee, (3) the placement of a child with the Employee in connection with the adoption of the child, or (4) caring for a child immediately following the birth or placement of the child. "Computation Period" means the 12-month period used for purposes of determining if a Break in Service has occurred.

D. The calculation of the number of Hours of Service to be credited under paragraphs A(2) and A(3) for periods during which no duties are performed, and the crediting of such Hours of Service to periods of time for purposes of computations under the Plan shall be determined by the

Committee in accordance with the rules set forth in paragraphs (b) and (c) of the Regulation Section 2530.200b-2 prescribed by the Department of Labor, which rules shall be consistently applied with respect to all Employees within the same job classifications.

E. For classes of Employees paid on an hourly basis, and for Employees for whom records of hours are maintained, Hours of Service under paragraphs (A) and (C) shall be determined on the basis of hours for which 415 Compensation is paid or due. For all other Employees, Hours of Service under paragraphs (A) and (C) shall be determined by crediting each Employee with 45 Hours of Service for each week in which the Employee would have been credited with at least one Hour of Service under those sections.

2.32 Key Employee/Former Key Employee/Non-Key Employee

A. "Key Employee" means, for any Plan Year, any Employee or former Employee who, at any time during such Plan Year or any of the four preceding Plan Years, is an officer of the Employer if such individual's annual Total Compensation exceeds 150% of the dollar limitation under

Code Section 415(c)(1)(A); an owner (or considered an owner under Code Section 318) of one of the ten largest interests in the Employer if such individual's Compensation exceeds 100% of such dollar limitation under Code Section 415(c)(1)(A); a Five-Percent Owner of the Employer; or a 1% owner of the Employer who has an annual Total Compensation of more than $150,000. The determination period is the Plan Year containing the Determination Date and the four preceding Plan Years. The determination of who is a Key Employee will be made in accordance with Code Section 416(i)(1) and the regulations issued thereunder. The terms "Employee" and "Key Employee" include Beneficiaries of those individuals.

B. "Former Key Employee" means, for any Plan Year, a Participant who was a Key Employee but is not a Key Employee during the Plan Year.

C. "Non-Key Employee" means for any Plan Year, an Employee who is not a Key Employee. The term Non-Key Employee includes Employees who are Former Key Employees.

2.33 Life Only Annuity

"Life Only Annuity" means a benefit which is payable monthly throughout the lifetime of an individual without any survivor or death benefits.

2.34 Limitation Year

"Limitation Year" means the calendar year which begins on January 1 and ends on the next following December 31.

2.35 Net Profits

"Net Profits" means the net income or profits for the Employer's taxable year determined by the Employer upon the basis of its books of account in accordance with generally accepted accounting practices without any deduction for taxes based upon income or for contributions made by the Employer under this Plan.

2.36 Normal Retirement Date

"Normal Retirement Date" means the date a Participant attains age 65.

2.37 OASDI Rate

"OASDI Rate" means the rate of tax applicable under Code Section 3111(a) relating to Employer's OASDI tax. "OASDI" means the system of old-age, survivors and

disability insurance established under Title II of the Social Security Act and Federal Insurance Contributions Act.

2.38 Participant

"Participant" means any Eligible Employee who has entered the Plan in accordance with Article 3 and whose Account hereunder has not subsequently been liquidated.

2.39 Plan

"Plan" means The Orthopedic Clinic (401(k) Profit Sharing Thrift Plan and Trust Agreement, as set forth herein and as amended from time to time.

2.40 Plan Year

"Plan Year" means the accounting year of the Plan and Trust, which is the calendar year commencing on January 1 and ending on the next following December 31.

2.41 Postponed Retirement Date

"Postponed Retirement Date" means the date of actual retirement from the Employer by a Participant who remains Employed after reaching his Normal Retirement Date.

2.42 Pre-Tax Contributions

"Pre-Tax Contributions" means the aggregate of a Participant's contributions which are deductible as Employer Contributions under Code Section 401(k).

2.43 Qualified Election

"Qualified Election" means a waiver of (A) a Qualified Preretirement Survivor Annuity, (B) a Qualified Joint and Survivor Annuity if the Participant has a Spouse on the Annuity Starting Date or (C) a Life Only Annuity if the Participant does not have a Spouse on the Annuity Starting Date. The waiver must be in writing, must name a Beneficiary and an alternate form of payment, and must be consented to by the Participant's Spouse, if any. The Spouse's consent to a waiver must be witnessed by a Plan representative or notary public. Notwithstanding this consent requirement, a waiver will be deemed a Qualified Election if the Participant establishes to the satisfaction of a plan representative that such written consent cannot be obtained because there is no Spouse, the Spouse cannot be located, or the Participant has been abandoned (within the meaning of the law of the state in which the Participant is a resident), but only if the Participant has a court order or a Qualified domestic Relations Order which specifies that the Participant has been abandoned. Any consent necessary under this provision will be valid only with respect to the Spouse who signs the consent, or in the event

of a deemed Qualified Election, the designated Spouse. Additionally, a revocation of a prior waiver may be made by a Participant without the consent of the Spouse at any time before the commencement of benefits. The number of revocations shall not be limited.

2.44 Qualified Joint and Survivor Annuity

"Qualified Joint and Survivor Annuity" means an annuity for the life of the Participant with a survivor annuity for the life of the Spouse which is not less than 50% and not more than 100% of the amount of the annuity which is payable during the joint lives of the Participant and the Spouse and which is the amount of benefit which can be purchased with the Participant's vested Account.

2.45 Qualified Preretirement Survivor Annuity

"Qualified Preretirement Survivor Annuity" means the annuity payable to the Spouse of a deceased Participant under Section 8.12(C).

2.46 Related Group

"Related Group" means a group of organizations consisting of the Employer and any other organizations which form a controlled group under Code Sections 414(b)

and 414(c) (as modified by Code Section 415(h)) or an affiliated service group under Code Section 414(m).

2.47 Spouse (Surviving Spouse)

"Spouse (Surviving Spouse)" means the Spouse or surviving Spouse of the Participant determined as of the earlier of the date payment commences to the Participant or his date of death, provided that a former Spouse will be treated as the Spouse or surviving Spouse to the extent provided under a qualified domestic relations order as described in Code Section 414(p).

2.48 Super Top-Heavy

"Super Top-Heavy" means the Plan's status for a Plan Year if, as of the Determination Date, the Plan is (A) part of a Super Top-Heavy Group, or (B) more than 90% of the value of the Trust Fund is credited to the accounts of Key Employees, provided that the Plan shall not be Super Top-Heavy regardless of this 90% test if it is part of an Aggregation Group which is not Super Top-Heavy.

2.49 Super Top-Heavy Group

"Super Top-Heavy Group" means an Aggregation Group if, as of the Determination Date, the sum of the present value of the cumulative Accrued Benefits for Key

Employees under all defined benefit plans included in such group and the value of the aggregate trust funds allocated to accounts of Key Employees under all defined contribution plans included in such group exceeds 90% of a similar sum determined for all Employees.

2.50 Taxable Wage Base

"Taxable Wage Base" means the contribution and benefit base applicable under OASDI on the first day of the Plan Year.

2.51 Top-Heavy

"Top-Heavy" means the Plan's status for a Plan Year if, as of the Determination Date, the Plan is (A) part of a Top-Heavy Group, or (B) more than 60% of the value of the Trust Fund is credited to the Accounts of Key Employees, provided that the Plan shall not be Top-Heavy regardless of this 60% test if it is part of an Aggregation Group which is not Top-Heavy.

2.52 Top-Heavy Group

"Top-Heavy Group" means an Aggregation Group, if, as of the Determination Date, the sum of the present value of the cumulative Accrued Benefits for Key Employees under all defined benefit plans included in such group and

the value of the aggregate trust funds allocated to accounts of Key Employees under all defined contribution plans included in such group exceeds 60% of a similar sum determined for all Employees.

2.53 Top-Heavy Participant

"Top-Heavy Participant" is defined in Section 5.1(A).

2.54 Top-Heavy Ratios

"Top-Heavy Ratios" means the amounts determined on the basis of the following provisions:

A. The Top-Heavy and Super Top-Heavy ratios shall be determined on the Determination Date in accordance with Code Section 416(g) and any regulations issued thereunder.

B. The terms "value of the Trust Fund," "value of the aggregate trust funds" and "Accrued Benefits" (1) shall include distributions made to Participants during the five-year period ending on the Determination Date and Rollover Accounts and plan-to-plan transfers to the extent required under Code Section 416(g) and any regulations issued thereunder, (2) shall exclude amounts held for the benefit of Former Key Employees, (3) for Plan Years beginning after December 31, 1984, shall exclude amounts held for

the benefit of Participants who have performed services for any Employer maintaining the Plan at any time during the five-year period ending on the Determination Date, and (4) shall exclude Deductible Employee contributions. When aggregating plans, the values shall be calculated with reference to the Determination Dates that fall within the same calendar year.

C. The value of Accrued Benefits under any defined benefit plans included in the Aggregation Group shall be determined as of the most recent valuation date during the 12-month period ending on the Determination Date using reasonable actuarial assumptions.

2.55 Trust

"Trust" means the legal entity created by this Trust Agreement as part of the Plan.

2.56 Trust Agreement

"Trust Agreement" means this Agreement.

2.57 Trustee

"Trustee" means Northern Trust Bank of Arizona, N.A., or any duly appointed successors, as provided in Article 10.

2.58 Trust Fund

"Trust Fund" means all property and income held by the Trustee under this Trust Agreement. "General Trust Fund" means that portion of the Trust Fund other than property and income held as or for Segregated Accounts or Participant-Selected Investment Funds under the provisions of this Trust Agreement.

2.59 Valuation Date

"Valuation Date" means the last day of each Plan Year and such other date as may be designated under Article 7 for the valuation of Participant's Accounts.

2.60 Valuation Period

"Valuation Period" means the Plan Year or any shorter periods of equal time designated by the Committee.

2.61 Year of Vesting Service

"Year of Vesting Service" is defined in Article 6.

ARTICLE 3

ELIGIBILITY, PARTICIPATION AND BENEFICIARY DESIGNATION

3.1 Eligibility for Participation

A. Each Employee who was a Participant in the Superseded Plan on December 31, 1986, shall continue to participate in the restated Plan.

B. Each other Eligible Employee shall become a Participant on the Entry Date coincident with or immediately following his Employment Commencement Date.

C. "Eligible Employee" means any Employee who is not an Ineligible Employee.

D. "Ineligible Employee" means any Employee who (1) is a Leased Employee but is treated as an Employee under Section 2.21, (2) is paid on an hourly basis and has an initial Employment Commencement Date of January 1, 1984, or later, or (3) is included in a unit of Employees covered by any collective bargaining agreement between Employee representatives and the Employer and other Employers, if any, wherein retirement benefits were the subject of good faith bargaining between the parties thereto and which does not provide that such Employees will be covered by this Plan.

3.2 Re-employment

A. A Participant whose Employment terminates (or who ceases to be a Participant for any other reason) shall re-enter the Plan as a Participant on the date of his Re-

Employment (or, if later, the date he again becomes an Eligible Employee).

B. An Eligible Employee who has satisfied the eligibility conditions of Section 3.1 but who terminates Employment prior to becoming a Participant, shall become a Participant in the Plan on the later of (1) the date of his Re-Employment, (2) the date he again becomes an Eligible Employee, or (3) the Entry Date on which he would have entered the Plan if he had not terminated Employment. Any other Eligible Employee who terminates Employment and is subsequently Re-Employed, shall become a Participant in accordance with the provisions of Section 3.1.

3.3 Change in Employee Status

If an Eligible Employee becomes an Ineligible Employee, he shall not be eligible to participate in future Employer Contributions. If an Ineligible Employee becomes an Eligible Employee, he shall participate in the Plan immediately if he has met the eligibility requirements under Section 3.1, or if he has not met those requirements, he shall become a Participant in accordance with the provisions of Section 3.1. Years of Vesting Service

completed by an Employee while an Ineligible Employee shall be credited in accordance with the provisions of Section 6.3.

3.4 Transfers

A. If an individual is transferred to service with the Employer after Employment with an organization which is a part of a Related Group that includes the Employer, but which does not participate in this Plan (hereinafter referred to as a "Non-participating Employer"), he shall become a Participant immediately if he is an Eligible Employee and has completed the eligibility requirements of Section 3.1, or, if both of these conditions are not met, he shall become a Participant in accordance with the provisions of Sections 3.1 and 3.4, if applicable.

B. If an Employee is transferred from service with the Employer to service with a Non-participating Employer, he shall cease to be a Participant.

C. Years of Vesting Service completed by an Employee while Employed by a Non-participating Employer shall be credited in accordance with the provisions of Section 6.3.

ARTICLE 4

CONTRIBUTIONS

4.1 Profit Sharing Contribution and Matching Contributions

A. For each Plan Year, the Employer shall make a Profit Sharing Contribution in an amount equal to 2% of the aggregate Plan Compensation of all Active Participants for such Plan Year or such greater amount as may be authorized by the Employer's Board of Directors.

B. Contributions shall be made during the Plan Year or within a reasonable period of time after the close of the Plan Year; provided, however, the contribution for any Plan Year shall not be made later than the date prescribed by law for filing the Employer's income tax return for the taxable year ending with or within such Plan Year, including extensions of such date.

C. For each Plan Year, the Employer shall make a Matching Contribution in an amount which, when added to the Forfeitures attributable to Matching Accounts and the Suspense Account, if any, shall equal 100% of each Participant's Pre-Tax Contributions for such Plan Year up to a maximum amount equal to 3.5% of the Participant's Plan Compensation for such Plan Year, provided that the Board of Directors may authorize an increase in the

maximum percentage of Plan Compensation which may be contributed. For purposes of the preceding, a Participant's Pre-Tax Contributions for any Plan Year shall not include any Excess Contributions which are returned to the Participant in accordance with Section 4.2.

4.2 Pre-Tax Contributions

A. Any Participant may make voluntary Pre-Tax Contributions to the Plan. The Committee shall determine the minimum and maximum rates of contribution, provided that the minimum contribution shall not be less than 1% of Plan Compensation (unless the Participant is electing to make no Pre-Tax Contribution) and the maximum contribution shall not exceed 12% of Plan Compensation. The Participant shall designate, in writing, the amount of the contribution to be deducted from his paychecks without reduction for any income taxes or withholding. A Participant's Pre-Tax Contributions shall be credited to such Participant's Pre-Tax Account and shall be treated as Employer Contributions for purposes of their deductibility and tax treatment under the Code.

B. The Committee shall have the power to establish uniform and non-discriminatory rules and, from time to

time, to modify or change such rules governing the manner and method by which Participant Pre-Tax Contributions shall be made, as well as any manner and method by which Pre-Tax Contributions may be changed or discontinued temporarily or permanently.

C. All Pre-Tax Contributions shall be delivered to the Trustee by the Employer within a reasonable period following the date of payroll deduction, but in no event later than 30 days after the last day of the Valuation Period to which they are attributable.

D. If a Participant's Pre-Tax Contributions made for any Plan Year would cause the Plan to fail to meet the non-discrimination requirements of Code Section 401(k) and the regulations thereunder, or would cause the total contributions to exceed the allowable deduction under Code Section 404(a), then the Committee shall reduce as necessary the Pre-Tax Contributions for the Highly-Compensated Employees for the remainder of the Plan Year beginning with the Participant whose Pre-Tax Contribution, when expressed as a percentage of Plan Compensation, is largest. If any Excess Contributions still remain at the end of a Plan Year, then the Committee shall return the Excess

Contributions, and any income allocable to such Excess Contributions, to the Participant within 2-1/2 months after the end of the Plan Year, if possible, to avoid the 10% excise tax on Excess Contributions, but in no event later than the end of the following Plan Year to avoid disqualification of the Plan. Any distribution of Excess Contributions, and any income allocable to such Excess Contributions, for any Plan Year shall be made (1) only to Participants who are Highly Compensated Employees and (2) on the basis of the respective portions of the Excess Contributions attributable to each of such Participants. The term "Excess Contributions" means, with respect to any Plan Year, the excess of:

1. the aggregate amount of Employer Contributions actually paid over to the Plan on behalf of Highly Compensated Employees for such Plan Year, over
2. the maximum amount of such Contributions permitted under Code Section 401(k) (determined by reducing Contributions made on behalf of Highly Compensated Employees in order of the actual deferral percentages (as

defined in Code Section 401(k)) beginning with the highest of such percentages).

E. The maximum amount which a Participant can elect to defer for any of his taxable years under all cash or deferred arrangements under Code Section 401(k) which are maintained by the Employer and by any other employers is $7,000, or such greater amount which reflects adjustments for inflation as permitted under Code Section 402(g).

F. The following provisions shall apply to Excess Deferrals:

1. Notwithstanding any other provision of the Plan, Excess Deferrals and income allocable thereto which have been allocated by a Participant to this Plan pursuant to the procedures in Section 4.2(G)(3), shall be distributed to Participants who request distribution of such Excess Deferrals made during the Participant's preceding taxable year, and income allocable thereto, no later than the April 15 following the end of such taxable year.

2. "Excess Deferrals" shall mean the excess of the amount of Pre-Tax Contributions for a Participant's taxable year that the Participant makes under this Plan, plus the amounts deferred for the same year under other plans or arrangements described in Code Sections 401(k), 408(k) or 403(b), over the limit imposed on the Participant by Code Section 402(g) for the Participant's taxable year in which such contributions and deferrals occurred.

3. The Participant's request shall be in writing, shall be submitted to the Committee no later than the March 1 following the end of the taxable year in which the Excess Deferrals are made, and shall specify the amount of the Participant's Excess Deferrals for the preceding taxable year and the amount of such Excess Deferrals which the Participant elects to have allocated to this Plan.

4.3 <u>After-Tax Contributions</u>

The balance in each Participant's After-Tax Account shall be fully vested at all times and shall not be subject to forfeiture for any reason. A Participant shall not be permitted to make After-Tax Contributions on or after January 1, 1987. Separate bookkeeping records shall be maintained to record the portion of each After-Tax Account which represents the aggregate After-Tax Contributions made during all Plan Years beginning before January 1, 1987.

4.4 General Provisions

A. Employer Contributions shall not exceed an amount which is estimated will constitute an allowable deduction under Code Section 404(a). The Employer Contribution shall be reduced, if necessary, by any amount which could not be allocated to the Account of any Participant in the preceding year due to the limitations regarding Annual Additions, as provided in Article 5.

B. In the event an Employer Contribution is made by a mistake of fact, or is disallowed as a deduction under Code Section 404(a), the Employer shall be entitled to recover from the Trustee the amount contributed by mistake of fact or disallowed within one year after the date

the Employer Contribution was made, or is disallowed as a deduction. Trust income attributable to the amount to be recovered shall not be paid to the Employer, and Trust loss attributable thereto shall reduce such amount.

C. If the Commissioner of the Internal Revenue, upon the Employer's request for approval of the restated Plan, determines that the Trust as continued under the restated Plan is not a qualified Trust exempt from income tax, then the Superseded Plan shall be deemed to not have been superseded.

4.5 Rollover Contributions

A. Any Employee, with the Employer's written consent and after filing with the Trustee the form prescribed by the Committee, may contribute cash, or other property which is acceptable to the Trustee, to the Trust other than as a Pre-Tax Contribution if the contribution is a "Rollover Contribution" which the Code permits an Employee to transfer either directly or indirectly from one qualified plan to another qualified plan. Before accepting a Rollover Contribution, the Trustee may require an Employee to furnish satisfactory evidence that the proposed transfer is in fact a "Rollover Contribution" which the Code permits

an Employee to make to a qualified plan. If an Employee makes a Rollover Contribution before he becomes eligible to participate in the Plan under Section 3.1, he shall be treated as a Participant for all purposes of the Plan except the rights to make Pre-Tax Contributions and to share in the allocation of any amounts under Article 5.

B. If the Participant makes a Rollover Contribution to the Trust, the Trustee shall invest the amount contributed as a part of the Trust Fund. In all respects, the Trustee and the Committee shall hold, administer and distribute a Rollover Contribution in the same manner as any Employer Contribution made to the Trust, provided that a Participant shall not withdraw any portion of his Rollover Account prior to his termination of employment.

ARTICLE 5

ALLOCATION OF CONTRIBUTIONS

5.1 Allocation of Employer Contribution

A. As of the last day of each Plan Year, the Committee shall allocate and credit to the Profit Sharing Account of each Top-Heavy Participant that portion of the Employer Contribution, Forfeitures, and Suspense Account, if applicable, for such Plan Year which is equal to the

Minimum Top-Heavy Percentage of his Plan Compensation. The remainder of the Employer Contribution, Forfeitures, and Suspense Account shall be allocated in accordance with Section 5.1(B) or, for Plan Years beginning on or after January 1, 1989, Section 5.1(C). "Top-Heavy Participant" means any Participant who is Employed on the last day of the Plan Year or who is an Active Participant.

B. Subject to any restoration allocation under Section 5.2 or Article 6, the Committee shall allocate the remainder, if any, of the Employer Contribution, Forfeitures, and Suspense Account, if applicable, to the Profit Sharing Accounts of all Active Participants in accordance with the following for Plan Years beginning before January 1, 1989:

1. First, the Committee shall allocate and credit to each such Active Participant's Account that percentage which is in the same ratio that each such Active Participant's Excess Compensation for the Plan Year bears to the total Excess Compensation of all such Active Participants for the Plan Year; provided,

however, the maximum amount which may be allocated to the Account of an Active Participant under this paragraph (1) for any Plan Year shall not exceed the product of his Excess Compensation multiplied by the OASDI Rate in effect on the first day of the Plan Year.

2. Second, the Committee shall allocate the balance, if any, to each such Active Participant's Account in the same proportion that the ratio of his Plan Compensation for the Plan Year bears to the aggregate Plan Compensation of all such Active Participants for the Plan Year.

C. Subject to any restoration allocation under Section 5.2 or Article 6 and the direction of the Board of Directors under Section 5.1, the Committee shall allocate the remainder, if any, of the Employer Contribution, Forfeitures, and Suspense Account, if applicable, to the Profit Sharing Accounts of all Active Participants in accordance with the following for Plan Years beginning on or after January 1, 1989:

1. First, the Committee shall allocate and credit to each Active Participant's Account that percentage which is in the same ratio that each such Active Participant's Excess Compensation bears to the total Excess Compensation of all Active Participants, provided, however, the maximum amount which may be allocated to the Active Participant's Account under this paragraph (1) shall not exceed the product of the Active Participant's Excess Compensation multiplied by the percentage of Plan Compensation allocated in Section (B) above.

2. Second, the Committee shall allocate and credit to each such Active Participant's Account that percentage which is in the same ratio that the sum of each such Active Participant's Excess Compensation and his Plan Compensation for the Plan Year bears to the sum of the total Excess Compensation and aggregate Plan Compensation of all such Active Participants for the Plan Year;

provided, however, the maximum amount which may be allocated to the Account of an Active Participant under this paragraph (2) for any Plan Year shall not exceed the product of (a) the sum of his Excess Compensation and Plan Compensation multiplied by (b) the remainder obtained by subtracting the percentage from the OASDI Rate in effect on the first day of the Plan Year.

3. Third, the Committee shall allocate the balance, if any, to each such Active Participant's Account in the same proportion that the ratio of his total Plan Compensation for the Plan Year bears to the total Plan Compensation of all such Active Participants for the Plan Year.

D. As of the last day of each Plan Year, the Committee shall allocate and credit to the Matching Account of each Participant that portion of the Matching Contribution, Forfeitures and Suspense Account, if applicable, for such Plan Year which is equal to 100% of his aggregate Pre-Tax

Contributions for such Plan Year up to a maximum amount equal to 3.5% of the Participant's Plan Compensation for such Plan Year, or such greater percentage of Plan Compensation which may be authorized by the Board of Directors for such Plan Year. For purposes of the preceding, a Participant's Pre-Tax Contributions for any Plan Year shall not include any Excess Contributions which are returned to the Participant in accordance with Section 4.2.

E. For each Plan Year, the Minimum Top-Heavy Percentage shall be (A) the lesser of (1) 3% and (2) the greatest percentage at which an Employer Contribution (including Pre-Tax Contributions for this purpose) is made for such Plan Year for a Key Employee or (B) such greater percentage as may be authorized by the Employer.

F. "Active Participant" means:

1. A Participant who is an Eligible Employee and is Employed on the last day of the Plan Year, or

2. A Participant who terminated Employment during the Plan Year due to death or Disability, or after having reached his Normal

Retirement Date, and was an Eligible Employee on the date his Employment terminated.

5.2 Restoration Procedures

A. In the event that a Participant's Account was improperly excluded in any Plan Year from an allocation of Employer Contributions pursuant to Section 5.1, such Participant's Account shall be restored to its correct status in an amount as follows:

1. First, an amount which is computed on the same basis as was the allocation of Employer Contributions which were properly allocated to Participants under Section 5.1 in each Plan Year for which restoration is necessary, and

2. Second, an amount of Trust Fund income, gain or loss which is computed on the same basis as was the allocation of Trust Fund income, gain or loss which was properly allocated to Participants' Accounts under Article 7 in each Plan Year for which restoration is necessary.

B. To restore the Account, the Committee shall allocate and credit to such Participant's Account the amount necessary from the portion of the Employer Contribution, Forfeitures, and Suspense Account, if applicable, for such Plan Year which are in excess of the Minimum Top-Heavy Percentage allocated under Section 5.1(A). No allocations shall be made pursuant to Sections 5.1(B), 5.1(C), 5.1(D) and 5.1(E) to the Account of any Participant until each improperly excluded Account has been fully restored. The Employer shall contribute any additional amount which is necessary to fully restore each improperly excluded Account.

5.3 Limitations on Annual Allocations

A. Notwithstanding any other provision of this Plan to the contrary, the Annual Addition to a Participant's Account for any Limitation Year shall not exceed the lesser of (1) $30,000 or, if greater, 25% of the dollar limitation in effect under Code Section 415(b)(1)(A), or (2) 25% of the Participant's total 415 Compensation for such Limitation Year. The dollar limitation shall be automatically increased as permitted by the Internal Revenue Service regulations to reflect cost-of-living increases. As of January 1st of each

calendar year, beginning on or after January 1, 1988, the dollar limitation under Code Section 415(b)(1)(A) as determined by the Secretary of the Treasury for that calendar year shall be the maximum dollar limitation for all Limitations Years ending with or within that calendar year.

B. "Annual Addition" shall mean, for the Limitation Year to which the allocation pertains, the Employer Contributions, Forfeitures and Suspense Account amounts allocated to the Participant's Employer Account plus the Participant's Pre-Tax Contributions and the Participant's After-Tax Contributions, provided, however, for Limitations Years commencing before January 1, 1987, only the lesser of (1) the Participant's After-Tax Contributions in excess of 6% of his 415 Compensation in the Limitation Year, and (2) ½ of such After-Tax Contributions shall be counted as Annual Additions.

C. In the event that as a result of a reasonable error in estimating a Participant's 415 Compensation or other limited facts and circumstances which the Internal Revenue Service finds to be applicable) an amount is allocated which would result in the Annual Addition limitation being exceeded with respect to any Participant and the

Participant is covered by the Plan at the end of the Limitation Year, the excess amount in the Participant's Account will be used to reduce Employer Contributions (including any allocation of Forfeitures) for such Participant in the next Limitation Year, and each succeeding Limitation year if necessary. If the Participant is not covered by the Plan at the end of the Limitation Year, the excess amount will be held unallocated in a Suspense Account. The Suspense Account will be applied to reduce future Employer Contributions (including allocation of any Forfeitures) for all remaining Participants in the next Limitation Year, and each succeeding Limitation Year if necessary. If a Suspense Account is in existence at any time during the Limitation Year pursuant to this section, it will not participate in the allocation of the Trust's investment gains and losses. In the event a Suspense Account is in existence when the Plan is terminated, the amount held in the Suspense Account shall revert to the Employer.

5.4 Limitation on Combined Plans

A. If a Participant is included in one or more defined benefit plans and one or more defined contribution plans maintained by the Employer, the sum of the defined benefit

plan fraction and the defined contribution plan fraction for any Limitation year may not exceed 1.0. If a restriction on benefits for any Participant is required, such restriction will first be applied to the benefit under the defined benefit plan or plans.

B. The defined benefit plan fraction is a fraction, the numerator of which is the Participant's projected annual benefit under the Plan (determined at the close of the year) and the denominator of which is the lesser of (1) 1.25 times the maximum benefit allowable under Code Section 415(b) (determined at the close of the year), or (2) 1.4 times the Participant's highest three-year average 415 Compensation. Notwithstanding the above, if the Participant was a Participant in one or more defined benefit plans maintained by the Employer which were in existence on July 1, 1982, the denominator of this fraction will not be less than 125% of the sum of the annual benefits under such plans which the Participant had accrued as of the end of the last Limitation Year beginning before January 1, 1983. The preceding sentence applies only if the defined benefit plans individually and in the aggregate satisfied the requirements

of Code Section 415 as in effect at the end of the 1982 Limitation Year.

C. The defined contribution plan fraction for any Plan Year is a fraction, the numerator of which is the sum of the annual additions to the Participant's accounts in such Plan Year and for all prior Plan Years and the denominator of which is the sum of the increments for all Limitation Years of the Participant's service with the Employer where each increment is the lesser of (1) 1.25 times the dollar limitation for that Plan Year, or (2) 1.4 times 25% of 415 Compensation for that Plan Year (assuming for this purpose that Code Section 415(c) had been in effect during such prior Plan Years). If the Participant was a Participant in one or more defined contribution plans maintained by the Employer which were in existence on July 1, 1982, the numerator of this fraction will be adjusted if the sum of this fraction and the defined benefit fraction would otherwise exceed 1.0 under the terms of this Plan. Under the adjustment, an amount equal to the product of (1) the excess of the sum of the fractions over 1.0 times (2) the denominator of this fraction, will be permanently subtracted from the numerator of this fraction. The

adjustment is calculated using the fractions as they would be computed as of the end of the last Limitation Year beginning before Janaury 1, 1983. This adjustment also will be made if at the end of the last Limitation Year beginning before January 1, 1984, the sum of the fractions exceeds 1.0 because of accruals or additions that were made before the limitations of this Article became effective to any plans of the Employer in existence on July 1, 1982.

D. For the purposes of this limitation, all defined benefit plans of the Employer, whether terminated or not terminated, are to be treated as one defined benefit plan, and all defined contribution plans, whether terminated or not terminated, are to be treated as one defined contribution plan.

E. For any Plan Year beginning on or after January 1, 1984, all references to 1.25 in paragraphs (B) and (C) above shall be changed to 1.0 if:

1. The Plan is Super Top-Heavy; or
2. The Plan is Top-Heavy but not Super Top-Heavy and the minimum, nonintegrated benefit under the defined benefit plan(s) is less than 3% of average compensation for

each year of service as defined in Code Section 416(c), and the minimum, nonintegrated contribution under the defined contribution plan(s) is less than 7-1/2%.

5.5 Related Group

All members of a Related Group which includes the Employer shall be considered a single Employer for purposes of applying the limitations of Code Section 415.

5.6 Tax Reform Act of 1986 Limitations

In addition to other limitations set forth in the Plan and notwithstanding any other provisions of the Plan, the Annual Additions to the Account balances, including the right to any optional benefits provided in the Plan (and all other defined contribution plans required to be aggregated with this Plan under the provisions of Code Section 415), shall not increase to an amount in excess of the amount permitted under Code Section 415 at any time. Notwithstanding any provision of this Plan to the contrary, for purposes of the preceding sentence and for purposes of determining whether the benefits of this Plan exceed the limitations of Code Section 415, with respect to limitations years beginning after December 31, 1986, the term "Annual

Addition" shall include all Employee contributions to the Plan. This shall not require the recomputation of Annual Additions for Limitation Years beginning before January 1, 1987. For purposes of this paragraph and determining compliance with Code Section 415, compensation shall mean compensation as defined in Code Section 415(b)(3) and the regulations thereunder.

ARTICLE 6

VESTING OF ACCOUNTS

6.1 Employee Accounts

The amounts credited to a Participant's Pre-Tax Account, After-Tax Account, Rollover Account and Trustee to Trustee Transfer Account shall be fully vested at all times.

6.2 Employer Accounts

A. The amounts credited to a Participant's Employer Account shall be fully vested on his Normal Retirement Date, if he is Employed on or after such date, or, if earlier, on the date he terminates Employment by reason of death or Disability, regardless of the number of Years of Vesting Service he has completed on such date.

B. If a Participant terminates Employment for any reason other than retirement on or after his Normal Retirement Date, death or Disability, his vested interest in his Employer Account shall be determined in accordance with the following schedule:

Years of Vesting Service	Percentage Vested
Less than 2 years	0%
2	20
3	40
4	60
5	80
6 or more	100

6.3 Years of Vesting Service

A. Participant's vested interest in his Employer Account under Section 6.2 shall be determined by this Years of Vesting Service. Subject to the provisions of Section 6.3(B) and 6.3(C), an Employee shall accrue one Year of Vesting Service for each Plan Year, commencing with the Plan Year in which he was first Employed, during which he completes 1,000 or more Hours of Service with the Employer.

B. For Plan Years beginning before January 1, 1985, if a terminated Employee or Participant is Re-Employed before he has a Break in Service, his Years of Vesting Service shall be reinstated as of the date of his Re-Employment. If an Employee or Participant incurs a Break in Service, his Years of Vesting Service as of the date of his initial Break in Service shall be disregarded if both of the following conditions exist:

1. He did not have a vested interest in his Employer Account as of his initial Break in Service; and
2. His Years of Vesting Service as of his Break in Service were less than or equal to the number of consecutive Plan Years in which he did not complete more than 500 Hours of Service beginning with his initial Break in Service and ending on the first day of the Plan Year in which he again has more than 500 Hours of Service.

C. For Plan Years beginning on or after January 1, 1985, if a terminated Employee or Participant is re-Empoyed before he incurs five consecutive Breaks in

Service, his Years of Vesting Service shall be reinstated as of the date of his Re-Employment. If an Employee or Participant incurs five consecutive Breaks in Service, his Years of Vesting Service as of the date of his initial Break in Service shall be disregarded if both of the following conditions exist:

1. He did not have a vested interest in his Employer Account as of his initial Break in Service; and
2. His Years of Vesting Service as of his Break in Service were less than or equal to the number of consecutive Plan Years in which he did not complete more than 500 Hours of Service beginning with his initial Break in Service and ending on the first day of the Plan Year in which he again has more than 500 Hours of Service. If a terminated Employee or Participant is Re-Employed before the number of consecutive Breaks in Service exceed his prior Years of Vesting Service, his Years of Vesting Service shall be reinstated as of the date of his Re-Employment.

D. For purposes of Sections 6.3(B) and 6.3(C), Years of Vesting Service previously disregarded by operation of the Break in Service rules shall not be included.

6.4 Forfeitures

A. Any remainder of a terminated Participant's Employer Account which is not vested in accordance with the vesting schedule under Section 6.2 shall be forfeited as of the last day of the Plan Year in which he incurs a Break in Service after terminating Employment; provided, however, if such Participant does not incur a Break in Service before the first day of the Plan Year beginning after December 31, 1984, any remainder of the Employer Account which is not vested shall be forfeited on the earlier of (1) the last day of the Plan Year in which he incurs five consecutive Breaks in Service, or (2) the date the Participant receives a distribution of the entire vested portion of his Account, if the distribution is made on or before the last day of the Plan Year following the Plan Year in which the Participant terminated Employment.

B. Forfeitures as of the last day of the Plan Year which are attributable to Participant's Matching Accounts shall be

used to reduce the Employer's Matching Contribution under Section 4.1.

C. Forfeitures as of the last day of the Plan Year which are attributable to Participant's Profit Sharing Accounts shall be treated as an additional Profit Sharing Contribution for such Plan Year for allocation purposes under Sections 5.1, 5.2, 6.6 and 6.9.

6.5 Re-employment for Plan Years Beginning Before January 1, 1985

For Plan Years beginning before January 1, 1985, if a Participant is Re-Employed before he incurs a Break in Service, but after a distribution was made to the Participant, a separate Employer Account will be established for the Participant's interest in the Plan at the time distribution was made and his vested interest in the separate Employer Account shall be determined by applying the following formula:

Vested Interest = P(AB + (R x D)) minus (R x D)

For purposes of applying the formula, P is the vested percentage in accordance with Section 6.2 at the date of determination; AB is the Account Balance at the date of determination; D is the amount of the distribution

previously made; and R is the ratio of the Account Balance at the date of determination to the Account Balance immediately following the preceding distribution.

6.6 Re-employment for Plan Years Beginning On or After January 1, 1985

For Plan Years beginning on or after January 1, 1985, the following provisions shall apply:

A. After Five Breaks in Service: If a Participant is Re-Employed after incurring five consecutive Breaks in Service but before receiving a distribution of the entire vested portion of his Account, the balance of the vested portion of his Account which has not been distributed shall be held in a separate Account which is 100% nonforfeitable and another Account shall be established for future Employer contributions.

B. After Forfeiture on Distribution: If a Participant is Re-Employed before he incurs five consecutive Breaks in Service but after a distribution was made to the Participant which resulted in a forfeiture of the nonvested portion of his Account under Section 6.4(A), the amount forfeited, unadjusted for earnings or losses, shall be restored to his Account if the Participant repays the amount of the

distribution (or if the repayment qualifies as a "Rollover Contribution" under Section 4.5) before the date he incurs five consecutive Breaks in Service.

C. After Distribution Without Forfeiture: If the Participant is Re-Employed before he incurs five consecutive Breaks in Service but after a distribution was made and such distribution did not result in a forfeiture under Section 6.4(A), a separate Employer Account will be established for the Participant's interest in the Plan at the time distribution was made and his vested interest in the separate Employer Account shall be determined by applying the following formula:

Vested Interest = P(AB + (R x D)) minus (R x D)

For purposes of applying the formula, P is the vested percentage in accordance with Section 6.2 at the date of determination; AB is the Account Balance at the date of determination; D is the amount of the distribution previously made; and R is the ratio of the Account Balance at the date of determination to the Account Balance immediately following the preceding distribution.

D. Any restoration required under Section 6.6(B) shall be made in the same manner as the restoration of a forfeited Account under Section 6.9.

6.7 Change in Vesting Schedule

A. Though the Employer reserves the right to amend the vesting schedule at any time, the Employer shall not amend the vesting schedule (and no amendment shall be effective) if the amendment would reduce the vested percentage of any Participant's Employer Account (determined as of the later of the date the Employer adopts the amendment, or the date the amendment becomes effective) to a percentage less than the vested percentage computed under the Plan without regard to the amendment.

B. In the event any Plan amendment directly or indirectly affects the determination of a Participant's vested percentage, each Participant who has completed at least five Years of Vesting Service may elect to have a nonforfeitable percentage of his Employer Account determined under the Plan as in effect prior to the amendment. A Participant shall be considered to have met this requirement if he completes five Years of Vesting

Service, whether or not consecutive, prior to the expiration of the election period, which ends 60 days after the latest of:

1. The effective date of the amendment;
2. The date the amendment was adopted; or
3. The date the Participant is issued written notice of the amendment.

6.8 Divestment

Except as provided under Section 6.9, a Participant's vested rights shall not be subject to divestment for any reason.

6.9 Unclaimed Account

If all or a portion of a Participant's vested Account becomes payable under Section 8.1 and the Committee, after a reasonable search, cannot locate the Participant or his Beneficiary if such Beneficiary is entitled to payment, the vested Account shall be forfeited and treated as a Forfeiture under Section 6.4 on the day the Participant incurs a break in Service, or such later date as the Committee may decide. If the Participant or his Beneficiary subsequently presents a valid written claim for benefits to the Committee, the Committee shall cause the

vested Account, equal to the amount which was forfeited under this Article 6, to be restored within 60 days after the close of the Plan Year in which the written claim is filed with the Committee. To restore the Account, the Committee shall allocate to the Participant's Account the forfeitures and Suspense Account for the Plan Year for which restoration is to be made. The Employer shall contribute any additional amount which is necessary to fully restore the Account.

ARTICLE 7

PARTICIPANTS' ACCOUNTS

7.1 Separate Accounts

The Committee shall open and maintain a separate Account for each Participant. Each Participant's Account shall reflect the amounts allocated thereto and distributed therefrom and such other information as affects the value of such Account pursuant to this Agreement.

7.2 Accrued Benefit

A. A Participant's Accrued Benefit on any date shall be equal to the value of his Account as determined on the coincident or next preceding Valuation Date, plus any Contributions or other amounts subsequently credited

thereto, and less any distributions subsequently made therefrom. The Committee may maintain records of Accounts to the nearest whole dollar.

B. For purposes of any distribution to a Participant or withdrawal by a Participant under Article 8, the value of such a Participant's vested benefit shall be based on the value of his Account as of the Valuation Date immediatley preceding the date of distribution under Section 8.3 or withdrawal under Section 8.8, and no interest or portion of the net income or loss of the Trust Fund from the Valuation Date to the date of distribution shall be credited to or deducted from the value of the Account.

7.3 Year-End Statement

As soon as practicable after the end of each Plan Year, the Committee shall furnish to each Participant a statement of his Account determinated as of the last day of the Plan Year. Upon the discovery of any error or miscalculation in an Account, the Committee shall correct the same to the extent feasible. Statements to Participants are for reporting purposes only, and no allocation, valuation or statement shall vest any right or title in any part of the Trust Fund,

nor require any segregation of Trust Assets, except as is specifically provided in this Agreement.

7.4 Allocation of Trust Income or Loss

A. As of each Valuation Date and prior to any allocation of Contributions to be made as of such date, the net income or loss of the General Trust Fund and each Participant-Selected Investment Fund since the preceding Valuation Date, including net appreciation or depreciation, shall be allocated to each Participant's Account in such Fund in the ratio that the value as of the next preceding Valuation Date of each such Account invested in the Fund bears to the value as of the next preceding Valuation Date of all Accounts invested in the Fund, where the values of the Accounts are determined in accordance with Section 7.4(B).

B. For purposes of Paragraph (A) above, the value of a Participant's Account as of the last Valuation Date shall exclude any distributions to, withdrawals made by, or loans made to, the Participant during such Valuation Period and shall include the Employer Contributions made during the Valuation Period in accordance with uniform nondiscriminatory policies established by the Committee.

C. The Committee shall determine the net income or loss based on a statement from the Trustee of the receipts and disbursements of the Fund since the next preceding Valuation Date and of the fair market value of the Fund as of the Valuation Date.

7.5 Valuation of Trust Fund

The General Trust Fund, each Participant-Selected Investment Fund, each Segregated Account and each Directed Investment Account shall be valued as of the last day of each Plan Year and as of the last day of each Valuation Period and as of any other date the Committee directs the Trustee to value the Trust Fund.

7.6 Segregated Accounts and Directed Investment Account

The portion of any Participant's Account invested on a segregated basis as provided in Sction 11.4 or Section 11.5 shall be valued separately on each Valuation Date, and the net income or loss allocated to such Account shall be based on the property, including income, gain, loss and other changes in the value of the property, constituting such portion of the Account.

ARTICLE 8

DISTRIBUTIONS, WITHDRAWALS AND LOANS

8.1 Time of Distribution

A. No distribution shall be made or commenced prior to the earlier of the Participant's termination of Employment or the termination of the Plan without the establishment of a successor plan, except for withdrawals made in accordance with Section 8.7.

B. A Participant or Beneficiary must file a claim for benefits. The Committee shall direct the Trustee to distribute the Participant's benefits to him (or his Beneficiary in the event of death) within a reasonable period of time after the Valuation Date coincident with or next following the date the Participant (or Beneficiary) files a written claim for payment of benefits, without adjustment for earnings or losses allocated to the remaining Accounts on the Valuation Date following the date of distribution. Notwithstanding the above, if the value of the Participant's vested Account is $3,500 or less, payment shall be made in a lump sum in accordance with Section 8.3(C), or Section 8.4(E) or Section 8.14(E), whichever is applicable, no later than the last day of the Plan Year following the Plan Year in which the Participant terminates Employment (or dies).

C. If the value of a Participant's vested Account exceeds $3,500, and the Participant terminates Employment prior to his Normal Retirement Date, payment to such Participant shall be made on the later of (1) age 62 or (2) the Participant's Normal Retirement Date unless the Participant consents in writing to receive payment before such date. Such consent must meet the same requirements as a Qualified Election. If the value of a Participant's vested Account exceeds $3,500, the Participant continues his Employment after his Normal Retirement Date, he may defer receipt of benefits until the earlier of his actual date of retirement or his Required Beginning Date; provided, however, no Participant may defer benefits to the extent that he is creating a death benefit that is more than incidental.

D. For taxable years of a Participant which commence on or after January 1, 1989, the "Required Beginning Date" for any Participant shall be April 1 of the calendar year following the calendar year in which he attains age 70-1/2, provided, however, if the Participant attained age 70-½ prior to January 1, 1988 and is not a Five-Percent Owner at any time during the Plan Year ending with or within the

calendar year in which such Participant attains age 66-1/2 or any subsequent Plan Year, the Required Beginning Date shall be the later of (1) the April 1 following the calendar year in which he attains age 7 0-1/2 and (2) the earlier of the calendar year with or within which ends the Plan Year in which the Participant becomes a Five-Percent Owner and the calendar year in which he terminates Employment. For taxable years of a Participant which commence before January 1, 1989, the "Required Beginning Date" for any Participant shall be the later of April 1 of the calendar year following the calendar year in which he attains age 70-1/2 and the calendar year in which he terminates Employment, provided, however, if the Participant was a Five-Percent Owner at any time during the period of five consecutive Plan Years ending with or within the calendar year in which such Participant attains age 70-1/2, the Required Beginning Date shall be the April 1 following the calendar year in which he attains age 70-1/2.

E. If the value of a deceased Participant's vested Account exceeds $3,500, his designated Beneficiary may defer receipt of benefits subject to Section 8.2.

F. If a Participant does not defer the commencement date of his distribution under Section 8.1(C) above, such distribution shall begin no later than the 60th day after the last day of the Plan Year in which the latest of the following events occurs:

1. the Participant attains the earlier of age 65 or his Normal Retirement Date,
2. the Participant terminates Employment, or
3. the Participant files a claim for benefits.

If the amount of the distribution cannot be determined by such 60th day, payment of benefits, retroactive to such day, shall begin not later than 60 days after the earliest date on which the amount of the distribution can be determined.

8.2 Time of Distribution After Death

A. If the Participant dies after distribution of his benefit has commenced, the remaining portion of such benefit will continue to be distributed at least as rapidly as under the method of distribution being used prior to the Participant's death.

B. If the Participant dies before distribution of his benefit commences, the Participant's entire benefit will be distributed no later than five years after the Participant's

death, except to the extent that an election is made to receive distributions in accordance with (1) or (2) below:

1. If any portion of the Participant's benefit is payable to a designated Beneficiary in substantially equal installments over the life expectancy of the designated Beneficiary, payment shall commence no later than one year after the Participant's death;

2. If the provisions of Section 8.14 are applicable and the Participant's Spouse is a designated Beneficiary, the date distributions to such Spouse are required to begin in accordance with (1) above shall not be earlier than the date on which the Participant would have attained age 62, or if later, his expected Normal Retirement Date, and, if the Spouse dies before payments begin, subsequent distributions shall be made as if the Spouse had been the Participant.

8.3 Method of Payment for Distribution During Life

A. Subject to Section 8.14, distribution to a Participant shall be made in a lump sum payment

commencing on the date elected by the Participant in accordance with Section 8.1.

B. If the value of the Participant's vested Account is $3,500 or less, payment shall be made in a lump sum in accordance with Section 8.1(B). Notwithstanding the preceding, no lump sum payment of any value may be made after the Annuity Starting Date without the consent of the Participant and his Spouse, or the Spouse if the Participant is deceased. Such consent must meet the same requirements as a Qualified Election.

8.4 Method of Payment After Death

A. Each Eligible Employee, upon becoming a Participant and upon commencement of his benefit in any form other than a lump sum payment, shall designate a Beneficiary or Beneficiaries to receive benefits under the Plan after the death of the Participant. A Participant may change his Beneficiary designation at any time. Subject to Section 8.4(B), "Beneficiary" means the first of the following classes of persons in the order named with a living member on the respective dates that distributions are payable:

1. The Beneficiary or Beneficiaries designated by the Participant, as herein provided, in the proportions and in the order provided in the designation, or if no provision is made, in equal shares;

2. The Spouse to whom the Participant was married at the time of his death;

3. The Participant's natural and adopted children in equal shares, provided that the then living issue of any deceased child shall take their parent's share by right of representation;

4. The Participant's parents, in equal shares;

5. The Participant's brothers and sisters, in equal shares.

B. If a Participant has a Spouse on his date of death, has died after payment of his benefit commenced, and has designated a Beneficiary which is not the Spouse, the designation shall be invalid and the Spouse shall be the Participant's sole Beneficiary unless the Spouse has signed the designation in a manner conforming to a Qualified Election. If a Participant has a Spouse on his date of death,

has died before payment of his benefit commenced, and has designated a Beneficiary which is not the Spouse, the following provisions shall apply unless the Spouse has signed the designation in a manner conforming to a Qualified Election:

1. If the provisions of Sections 8.14(A)(1) and 8.14(A)(3) are met, the designation of a Beneficiary which is not the Spouse shall be invalid to comply with Section 8.14(A)(2) and the Participant's entire Account shall be distributed to his Spouse in accordance with the provisions of Section 8.3.

2. If the provisions of Section 8.14 are applicable because the conditions of Section 8.14(A)(1) or Section 8.14(A)(3) are not met, the designation of a Beneficiary which is not the Spouse shall be effective only with respect to the remaining 50% of the Participant's Account which is not used to purchase an annuity for the Spouse under Section 8.14(C).

C. Subject to Section 8.4(B), if a Participant dies before the Annuity Starting Date, distribution shall be made in a lump sum payment within the twelve-month period ending on the anniversary of the Participant's date of death.

8.5 General Payment Provisions

A. Benefits under the Plan shall be distributed solely from the Trust, and the Employer shall have no liability or responsibility therefor. Distribution of benefits shall be limited to the portion of a Participant's Account which is vested under Articles 6 and 12.

B. Distributions shall be made by the Trustee only in accordance with the directions of the Committee. The Committee shall have the authority to direct the distributions in accordance with the terms and conditions of the Plan. If payment is being made in a lump sum, distributions shall be made in cash or in kind as elected by the Participant or Beneficiary in writing on a form prescribed by and filed with the Committee. The Trustee shall purchase a non-transferable annuity contract if Section 8.14 is applicable and the Participant or Beneficiary elects an annuity form of payment.

C. All methods of distribution with respect to a Participant or Beneficiary shall be of equal value on the date payments are to commence.

8.6 Transitional Rule

A. Notwithstanding the other requirements of Article 8 other than those relating to the Qualified Joint and Survivor Annuity and Qualified Preretirement Survivor Annuity, distribution on behalf of any Participant, including a Five-Percent Owner, may be made in accordance with all of the following requirements (regardless of when such distribution commences):

1. The distribution by the Trust is one which would not have disqualified such Trust under Code Section 401(a)(9) as in effect prior to amendment by the Deficit Reduction Act of 1984.

2. The distribution is in accordance with a method of distribution designated by the Participant whose benefit in the Trust is being distributed, or, if the Participant is deceased, by a Beneficiary of such Participant.

3. Such designation was in writing, was signed by the Participant or the Beneficiary, and was made before January 1, 1984.

4. The Participant had accrued a benefit under the Plan as of December 31, 1983.

5. The method of distribution designated by the Participant or the Beneficiary specifies the time at which distribution will commence, the period over which distributions will be made, and in the case of any distribution upon the Participant's death, the Beneficiaries of the Participant listed in order of priority.

B. A distribution upon death will not be covered by this transitional rule unless the information in the designation contains the required information described above with respect to the distributions to be made upon the death of the Participant.

C. For any distribution which commences before January 1, 1984, but continues after December 31, 1983, the Participant, or the Beneficiary, to whom such distribution is being made, will be presumed to have designated the method of distribution under which the

distribution is being made if the method of distribution as specified in writing and the distribution satisfies the requirement in Paragraphs (A)(1) and (A)(5) above.

D. If a designation is revoked any subsequent distribution must satisfy the requirements of Code Section 401(a)(9) as amended. Any changes in the designation will be considered to be a revocation of the designation. However, the mere substitution or addition of another Beneficiary (one not named in the designation) under the designation will not be considered to be a revocation of the designation, so long as such substitution or addition does not alter the period over which distributions are to be made under the designation, directly or indirectly (for example, by altering the relevant measuring life).

8.7 Distribution to Minors or Incompetent Persons

In case of any distribution to a minor or to a legally incompetent person, the Committee may direct the Trustee that the same be made for the benefit of such person directly to such person or to his legal representative or to some near relative of such person or that the Trustee shall use the same directly for the support, maintenance or education of such person. The Trustee shall not be

required to see to the application by any third party of any distributions made pursuant to this Section.

8.8 Withdrawals of Accounts During Employment

A. A Participant who is Employed may withdraw amounts from his Voluntary Account provided that (1) the aggregate amounts withdrawn shall not exceed the greater of (a) the aggregate amount of his After-Tax Contributions, and (b) the value of his After-Tax Account on the date of withdrawal and (2) Participant's Spouse must consent in writing to the withdrawal in a form which complies with the requirements for a Qualified Election and is signed within the 90-day period ending on the date of withdrawal, but only if the provisions of Section 8.14 are applicable to the Participant.

B. A Participant who is Employed may withdraw amounts from his Pre-Tax Account, provided, however, if the provisions of Section 8.14 are applicable to the Participant, the Participant's Spouse, if any, must consent in writing to such withdrawal in a form which complies with the requirements for a Qualified Election and is signed within the 90-day period ending on the date of withdrawal. If a Participant is making a withdrawal prior to the later of

the date he attains age 59-1/2 or the date he has been a Participant in the Plan for a minimum of 60 months, the Committee shall authorize withdrawals under this Section 8.8(B) only on account of hardship incurred by the Participant which imposes immediate and heavy financial needs which may not be reasonably met by the Participant's other resources. Determination of hardship shall be made by the Committee in a uniform and nondiscriminatory manner, and a withdrawal shall not exceed the amount required to meet the immediate financial need created by the hardship.

C. A Participant who is Employed may withdraw amounts from his Employer Account at any time after the later of the date he attains age 59-1/2 or the date he has been a Participant for a minimum of 60 months; provided that if the provisions of Section 8.14 are applicable to the Participant's Account, the Participant's Spouse must consent in writing to the withdrawal in a form which complies with the requirements for a Qualified Election and is signed within the 90-day period ending on the date of withdrawal.

D. If a Participant makes a withdrawal from his Pre-Tax Account prior to age 59-1/2, the Committee shall not make or allocate a Matching Contribution to the Participant's Matching Account for the Plan Year which includes the date on which he makes the withdrawal.

E. In-service withdrawals shall be made only on a Valuation Date. The Participant must request the withdrawal in writing at least 30 days prior to the Valuation Date. Payments shall be made in cash only within a reasonable period of time following the Valuation Date specified in the withdrawal request and shall be made in a single cash distribution.

F. The Committee shall establish a uniform, nondiscriminatory policy for making withdrawals.

8.9 Loans to Participants

A. Upon the application of any Participant, the Trustee, in accordance with its uniform, nondiscriminatory policy, may make a loan or loans to such Participant. No loan shall exceed the value of the vested portion of a Participant's Account. If the total of any such loan or loans to any Participant exceeds the greater of (1) and (2) as set

forth below, the excess portion of the loan shall be treated as a taxable distribution to the Participant:

1. $50,000 reduced by (a) the highest outstanding balance of loans from the Plan during the one-year period ending on the day before the date on which such loan is made, over (b) the outstanding balance of loans from the Plan on the date on which such loan is made; or

2. An amount which is the greater of (a) ½ of the value of the vested Account of the Participant or (b) $10,000.

B. The following requirements apply to the making, revising, renegotiating, extending, renewing or altering of any loan secured by all or a portion of the Participant's Account.

1. The Participant must consent to the loan and to the possible reduction in the Account in the event of a default in repaying such loan.

2. If the Participant is married and the provisions of Section 8.14 are applicable to the Participant, the Participant's Spouse must

also consent to the loan and to the possible reduction in the Participant's Account in the event of a default in repaying such loan.

3. Such consent must be made in a form which complies with the requirements for a Qualified Election and must be signed within the 90-day period ending on the date the loan is made, revised, renegotiated, extended, renewed or altered.

4. After the appropriate consent is obtained, the amount of any defaulted loan may be set off against the Participant's Account without obtaining any additional consents (including further spousal consent due to a change in marital status).

C. Loans shall provide for periodic repayment (not less frequently than quarterly) over a period not to exceed five years with substantially level amortization over the term of the loan. Except, however, loans used to acquire any dwelling unit which, within a reasonable time, is to be used (determined at the time the loan is made) as a principal residence of the Participant shall provide for period

repayment over a reasonable period of time that may exceed five years. In any event, all loans shall become due and payable on the earliest of the date the Participant terminates Employment, the date the Participant dies, the date the Plan assets are distributed as a result of termination of the Plan, or the date any distribution is made from the Participant's Account for any reason other than an in-service withdrawal of an amount which does not exceed the portion of the Participant's Account which has been pledged as security for any loan.

D. Any loans made on or after January 1, 1987, shall be attributed to the Participant's Accounts, and all loans, regardless of the date made, shall be secured by the assignment of the Participant's entire right, title and interest in and to the vested portion of his Accounts, in the following order:

1. After-Tax Account
2. Matching Account
3. Profit Sharing Account
4. Rollover Account
5. Pre-Tax Account

E. If any such loan has not been repaid on the earliest date specified in Section 8.9(c), it shall be considered in default and the Trustee shall treat the amount outstanding as if distributed and shall reduce the Participant's Account by such amount and terminate the security assignment of the balance of the vested portion of his Account.

8.10 Assignments

Except as provided under Section 8.9, the interest herein, whether vested or not, of any Participant, former Participant or Beneficiary, shall not be subject to alienation, assignment, encumbrance, attachment, garnishment, execution, sequestration or other legal or equitable process, or transferability by operation of law in the event of bankruptcy, insolvency or otherwise.

8.11 Qualified Domestic Relations Order

Section 8.10 shall also apply to the creation, assignment, or recognition of a right to any benefit payable with respect to a Participant pursuant to a domestic relations order, unless such order is determined to be (A) a qualified domestic relations order, as defined in Code Section 414(p), or (B) any domestic relations order entered before January 1, 1985. Upon receipt of a qualified

domestic relations order, the Committee shall direct the Trustee to provide for payment of benefits to an alternate payee as set forth in the order. The Committee shall establish procedures to determine whether an order is a qualified domestic relations order, to notify the Participant and any alternative payee of such determination, and to administer distributions pursuant to a qualified order.

8.12 Distributions Before Age 59-1/2

Notwithstanding any other provision herein, all or any portion of a Participant's Account shall not be distributed to the Participant prior to one of the events listed below unless the Participant receives a written notice on or before the date of the distribution informing him that the distribution may be subject to penalties imposed under Code Section 72(t), provided that such amount may be distributed without penalty if the distribution is rolled over to another qualified retirement plan or an individual retirement plan within 60 days of the date of distribution or if the distribution is a return of Excess Contributions under Section 4.1:

A. Retirement on or after the Early Retirement Date,

B. Attainment of age 59-1/2,

C. Disability, or

D. Death (if payment is made to a Beneficiary or to the Participant's estate).

8.13 Non-Transferability

Any annuity contract distributed from the Plan must be non-transferable.

8.14 Joint and Survivor Requirements

A. The provisions of this Section shall apply to a Participant if all of the following conditions are not met: 1) the Participant cannot or does not elect payments in the form of a life annuity; 2) on the death of the Participant, the Participant's vested Account will be paid to the Participant's Surviving Spouse, but if there is no Surviving Spouse or, if the Surviving Spouse has already consented in a manner conforming to a Qualified election, then to a Participant's designated Beneficiary; and 3) this Plan is not a direct or indirect transferee of a defined benefit plan, money purchase pension plan (including a target benefit plan), stock bonus, or profit-sharing plan which would otherwise provide for a life annuity form of payment to the Participant. If all three conditions are met, the other provisions of this Article shall be inoperative.

B. A Participant's vested Account shall be paid in the automatic form of payment listed below, unless the Participant elects an optional form of payment under Section 8.3(B) pursuant to a Qualified Election signed by the Participant and his Spouse, if any, within the 90-day period ending on the Annuity Stating Date:

1. If a Participant does not have a Spouse on the Annuity Starting Date, the Participant's vested Account shall be paid in the form of a Life Only Annuity commencing in accordance with Section 8.1.

2. If a Participant has a Spouse on the Annuity Starting Date, the Participant's vested Account shall be paid in the form of a Qualified Joint and Survivor Annuity commencing in accordance with Section 8.1.

C. Unless an optional form of benefit has been selected within the Election Period pursuant to a Qualified Election, if a Participant dies before benefits have commenced, then 50% (or 100% if the Spouse is the Participant's Primary Beneficiary) of the Participant's Account shall be applied toward the purchase of an annuity for the life of the

Surviving Spouse commencing in accordance with Section 8.1. The Surviving Spouse may elect payment in an optional form under Section 8.4(D). If the Spouse is not the sole Beneficiary, then the benefit payable to the Spouse shall be split between (1) the sum of the balances in the Employer Account and the Trustee to Trustee Transfer Account and (2) the balance in the Employee Account pro rata in the same proportion that the Spouse's share of the Death Benefit bears to the total Death Benefit payable. Such determination shall be made on the date the first payment is made to any Beneficiary. "Election Period" shall mean the period which begins on the first day of the Plan Year in which the Participant attains age 35 and ends on the date of the Participant's death. If a Participant separates from service prior to the first day of the Plan Year in which age 35 is attained, the Election Period shall begin on the date of separation with respect to the Account as of the date of separation.

D. If the value of the Participant's vested Account is $3,500 or less, payment shall be made in a lump sum in accordance with Section 8.1(B). Notwithstanding the preceding, no lump sum payment of any value may be made

after the Annuity Starting Date without the consent of the Participant and his Spouse, or the Spouse if the Participant is deceased. Such consent must meet the same requirements as a Qualified Election.

E. In the case of a Life Only Annuity or a Qualified Joint and Survivor Annuity as described in Section 8.3(A), the Plan Administrator shall provide each Participant within a reasonable period prior to the commencement of benefits, a written explanation of: (1) the terms and conditions of a Life Only Annuity and Qualified Joint and Survivor Annuity; (2) the Participant's right to make, and the effect of, an election to waive the Life Only Annuity or Qualified Joint and Survivor Annuity form of benefit; (3) the rights of a Participant's Spouse; and (4) the right to make, and the effect of, a revocation of a previous election to waive the Life Only Annuity or the Qualified Joint and Survivor Annuity.

F. In the case of a Qualified Preretirement Survivor Annuity as described in Section 8.14(C) above, the Plan Administrator shall provide each Participant within the Notice Period a written explanation of the Qualified Preretirement Survivor Annuity in such terms and in such

manner as would be comparable to the explanation provided for meeting the requirements of Section 8.14(E) applicable to the Life Only Annuity and the Qualified Joint and Survivor Annuity. The "Notice Period" for the waiver of the Qualified Preretirement Survivor Annuity, for a particular Participant, means whichever of the following periods ends last:

1. the period beginning on the first day of the Plan Year in which the Participant attains age 32 and ending on the close of the Plan Year preceding the Plan Year in which the Participant attains age 35.
2. a reasonable period after the individual becomes a Participant,
3. a reasonable period after the Qualified Preretirement Survivor Annuity ceases to be a fully subsidized benefit,
4. a reasonable period after the joint and survivor rules become applicable to the Participant, or

5. a reasonable period after the Participant separates from service if such separation occurs before he attains age 35.

ARTICLE 9

ADMINISTRATION OF PLAN

9.1 Named Fiduciaries

The authority to control and manage the operation and administration of the Plan shall be allocated as provided in this Trust Agreement between the Board of Directors, the Committee and the Trustee, all of whom are named fiduciaries under ERISA. In addition, procedures for the appointment of another fiduciary, an investment manager, are set forth in Section 11.2.

9.2 Duties of Fiduciaries

A. Each fiduciary shall perform his duties with respect to the Plan:

1. Solely in the interest of the Participants and Beneficiaries;
2. For the exclusive purpose of providing benefits to Participants and their Beneficiaries;

3. With the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

4. By diversifying the investments of the Trust Fund so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

5. In accordance with this Trust Agreement.

B. A fiduciary shall be liable, as provided in ERISA, for any breach of his fiduciary responsibilities. In addition, a fiduciary under this Plan shall be liable for a breach of fiduciary responsibility of another fiduciary under this Plan as provided under Section 405 of ERISA.

C. Any person or group of persons may serve in more than one fiduciary capacity with regard to the Plan. A fiduciary other than the Trustee may, with the consent of the Board of Directors, employ one or more persons to render advice and assistance with regard to any function

such fiduciary has under the Plan. The expenses of such persons shall be paid by the Employer.

D. A fiduciary shall not cause the Plan to engage in a transaction if he knows or should know that such transaction constitutes a prohibited transaction under Section 406 of ERISA or Code Section 4975, unless such transaction is exempted under Section 408 of ERISA or Code Section 4975, or under any other exemption granted by the U.S. Department of Labor.

9.3 Plan Administrator

The Employer is the Plan Administrator under ERISA and the Employer shall have the duty and authority to comply with those reporting and disclosure requirements of ERISA which are specifically required of the Plan Administrator.

9.4 Committee

The Board of Directors shall appoint an administrative Committee to manage and administer this Plan in accordance with the provisions hereof, each member to serve for such term as the Board of Directors may designate or until a successor member has been appointed or until removal of the Board of Directors. Vacancies due to

resignation, death, removal or other cause shall be filled by the Board of Directors. Members shall serve without compensation for Committee service. All reasonable expenses of the Committee shall be paid by Employer. If the Board of Directors fails to name a Committee, the Employer shall perform the duties of the Committee.

9.5 Action by Committee

The Committee shall act by agreement of a majority of its members, either by vote at a meeting or in writing without a meeting. By such action, it may authorize one or more members to execute documents on its behalf and direct the Trustee in the performance of its duties hereunder. The Trustee, upon written notification of such authorization, shall accept and rely upon such documents until notified in writing that the authorization has been revoked by the Committee. The Trustee shall not be deemed to be on notice of any change in the membership of the Committee unless notified in writing. A member of the Committee, who is also a Participant hereunder, shall not vote or act upon any matter relating solely to himself. In the event of a deadlock or other situation which prevents

agreement of a majority of the Committee members, the matter shall be decided by the Board of Directors.

9.6 Duties of the Committee

A. The Committee shall have the authority to:

1. Allocate the Employer's Contributions;
2. Determine the amount and allocation of the Trust income or loss;
3. Establish rules pertaining to Participants' Contributions and their suspension and withdrawal;
4. Direct the Trustee with respect to additional valuations;
5. Maintain separate Accounts for Participants;
6. Furnish, and correct errors in statements of accounts;
7. Determine the method, timing and media of distributions, and direct the Trustee with respect to distributions;
8. Approve methods of distribution to Beneficiaries;
9. Direct distribution of the interests of incompetent persons and minors;

10. Construe the Trust Agreement and determine questions thereunder;

11. Establish a funding policy;

12. Employ advisors and assistants;

13. Direct the Trustee with respect to its duties and investments; and

14. Appoint and delegate duties to an investment manager.

B. The Committee shall have the power and duty to do all things necessary or convenient to effect the intent and purpose of this Plan and, not inconsistent with any of the provisions thereof, whether or not such powers and duties are specifically set forth herein, and, not in limitation but in amplification of the foregoing, shall have the power to construe the Trust Agreement and to determine all questions that shall arise hereunder, including particularly, directions to and questions submitted by the Trustee on all matters necessary for it properly to discharge its powers and duties. Decisions of the Committee made in good faith upon any matters within the scope of its authority shall be final and binding on the Employer, the Trustee, Participants, their Beneficiaries and all others. The

Committee, at all times, in making and carrying out its decisions and directions, shall act in a uniform and nondiscriminatory manner and may, from time to time, prescribe and modify uniform rules of interpretation and administration.

9.7 Professional Agents

With the approval of the Board of Directors, the Committee may, from time to time, or on a continuing basis, retain such agents or advisors including, specifically, attorneys, accountants, actuaries, investment counsel, consultants and administrative assistants, as it considers necessary to assist in the proper performance of its duties. The expenses of such agents or advisors shall be paid by the Employer, or, if not paid by the Employer, the Committee may direct that such expenses be paid from the Trust Fund.

9.8 Claim Procedure

A. The Committee shall determine Participants' and Beneficiaries' rights to benefits under the Plan. In the event of a dispute over benefits, the Participant or Beneficiary may file a written claim for benefits with the Committee, provided that such claim is filed within 60 days

of the date the Participant or Beneficiary receives notification of the Committee's determination.

B. If a claim is wholly or partially denied, the Committee shall provide the claimant with a notice of denial, written in a manner calculated to be understood by the claimant and setting forth:

1. The specific reason for such denial;
2. Specific references to the pertinent Plan provisions on which the denial is based;
3. A description of any additional material or information necessary for the claimant to perfect the claim with an explanation of why such material or information is necessary; and
4. Appropriate information as to the steps to be taken if the claimant wishes to submit his or her claim for review.

C. The notice of denial shall be given within a reasonable time period but no later than 90 days after the claim is filed, unless special circumstances require an extension of time for processing the claim. If such extension is required, written notice shall be furnished to

claimant within 90 days of the date the claim was filed stating the specific circumstances requiring an extension of time and the date by which a decision on the claim can be expected, which shall be no more than 180 days from the date the claim was filed. If no notice of denial is provided as herein described, the claimant may appeal as though the claim had been denied.

D. The claimant or his representative, or both, may appeal the denied claim and may:

1. Request a review upon written application to the Committee;
2. Review pertinent documents; and
3. Submit issues and comments in writing, provided that such appeal is made within 60 days of the date the claimant receives notification of the denied claim.

E. Upon receipt of a request for review, the Committee shall, within a reasonable time period but not later than 60 days after receiving the request, provide written notification of its decision to the claimant stating the specific reasons and referencing specific Plan provisions on which its decision is based, unless special circumstances

require an extension for processing the review. If such an extension is required, the Committee shall notify the claimant of such special circumstances and of the date, no later than 120 days after the original date the review was requested, on which the Committee will notify the claimant of its decision.

9.9 Indemnification

To the fullest extent permitted by law, the Employer agrees to indemnify, to defend and hold harmless the members of the Committee, individually and collectively, against any liability whatsoever for any action taken or omitted by them in good faith in connection with this Plan and Trust or their duties hereunder and for any expenses or losses for which they may become liable as a result of any such actions or nonactions unless resultant from their own willful misconduct; and the Employer may purchase insurance for the Committee to cover any of their potential liabilities with regard to the Plan and Trust.

ARTICLE 10

TRUSTEE

10.1 Duties of Trustee

A. The duties of the Trustee shall be confined to receiving and paying funds of the Trust, safeguarding and valuing Trust assets, investing and reinvesting the Trust Funds, as provided in Article 11, and carrying out the directions of the Employer, the investment manager, if one has been appointed pursuant to Article 11. The directions of the Employer shall be in writing and bear the signature of one or more members of the Board of Directors as designated by the Employer as its authorized signator or signators. The directions of an investment manager or Participant shall be in writing or in such other form as is acceptable to the Trustee.

B. The Trustee shall not maintain the indicia of ownership of any Trust assets outside the jurisdiction of the district courts of the United States, except as authorized by regulations issued by the Department of Labor.

10.2 Powers of Trustee

A. In the discharge of its duties, the Trustee shall have all the powers, authority, rights and privileges of an absolute owner of the Trust Fund and, not in limitation of but in amplification of the foregoing, may receive, hold,

manage, invest and reinvest, sell, exchange, dispose of, encumber, hypothecate, pledge, mortgage, lease, grant options respecting, repair, alter, insure or distribute any and all property in the Trust Fund; may borrow money, participate in reorganizations, pay calls and assessments, vote or execute proxies, exercise subscription or conversion privileges and register in the name of a nominee any securities in the Trust Fund; may renew, extend the due date, compromise, arbitrate, adjust, settle, enforce or foreclose by judicial proceeds or otherwise or defend against the same, any obligations or claims in favor of or against the Trust Fund; may exercise options, employ agents; and, whether herein specifically referred to or not, may do all such acts, take all such actions and proceedings and exercise all such rights and privileges as if the Trustee were the absolute owner of any and all property in the Trust Fund.

B. The Trustee shall have no authority or duty to determine the amount of the Employer Contribution or to enforce the payment of any Employer Contribution to it.

C. The Trustee shall have the power to withhold Federal income taxes from any distribution to a Participant or Beneficiary.

10.3 Fees and Expenses

The Trustee's fees for its services as Trustee shall be such as may be mutually agreed upon by the Employer and the Trustee, and such fees shall be paid from the Trust Fund unless paid by the Employer, with the exception that individual Trustees shall serve without compensation for their service as such. However, with the approval of the Employer, individual Trustees may from time to time or on a continuing basis, retain such agents or advisors, including specifically accountants, attorneys, investment counsel and administrators, as they consider necessary to assist them in the proper performance of their duties. The expenses of such agents or advisors and all other expenses of the Trustee shall be paid from the Trust Fund unless paid by the Employer.

10.4 Accounting

A. Within 60 days or within a reasonable period following the close of each Plan Year, the Trustee shall render to the Employer an accounting of its administration

of the Trust during the preceding Plan Year. The Trustee shall also report to the Employer respecting determinations of the fair market value of the Trust Fund. Notwithstanding any other provisions of this Agreement, if the Trustee, in making such determinations, shall determine that the Trust Fund consists, in whole or in part, of property not traded freely on a recognized market or that information necessary to ascertain the fair market value thereof is not readily available to the Trustee, the Trustee shall request the Employer to instruct the Trustee as to the fair market value of such property for all purposes under the Plan and Trust Agreement; and in such event, the fair market value placed upon such property by the Employer in its instructions to the Trustee shall be conclusive and binding. If the Employer shall fail or refuse to instruct the Trustee as to the fair market value of such property within a reasonable time after receipt of the Trustee's request so to do, the Trustee shall take such action as is required to ascertain the fair market value of such property including the retention of such counsel and independent appraisers as it considers necessary; and in such event the fair market value so determined shall be conclusive and binding.

B. The written approval of any Trustee accounting by the Employer or Committee shall be final as to all matters and transactions stated or shown therein and binding upon the Employer, Committee, and all persons who then shall be or thereafter shall become interested in this Trust. Failure of the Employer or Committee to notify the Trustee within 90 days after receipt of any accounting of its disapproval of such accounting shall be the equivalent of written approval.

10.5 Resignation or Removal

A. The Trustee may resign at any time with 30 days prior written notice to the Employer and the Committee or such shorter period as may be agreeable to the Employer; provided that upon receipt of instructions or directions from the Employer or the Committee with which the Trustee is unable or unwilling to comply, the Trustee may resign upon written notice to the Employer and the Committee, given within a reasonable time under the circumstances then prevailing. After receipt of such instructions or directions and, notwithstanding any other provisions hereof, after its resignation the Trustee shall have no liability to the Employer, the Committee, or any

person interested herein for failure to comply with such instructions or directions. The Employer may remove the Trustee without cause at any time with 30 days prior written notice. In case of resignation or removal of the Trustee, the said Trustee shall have the right of a settlement of accounts, which may be made at the option of the Trustee, either by judicial settlement in an action in a court of competent jurisdiction or by agreement of settlement between the Trustee and the Employer; and the Trustee shall not be required to transfer assets of the Trust Fund to a successor Trustee or otherwise until its accounts have been settled.

B. Resignation or removal of the Trustee shall not terminate the Trust. In the event of vacancy in the Trusteeship of this Trust occurring at any time, the Employer shall appoint a successor Trustee to take the place of any Trustee who has died, resigned or been removed. In the event of the death, resignation or removal of a Trustee and the failure of the Board of Directors to appoint a successor within 30 days as herein provided, the remaining Trustees may by unanimous vote either select a successor for said Trustee or choose to function without

filling such vacancy. Any such successor Trustee shall have all the powers and duties herein conferred upon the original Trustee. The title to all Trust property shall automatically vest in a successor Trustee without the execution or filing of any instrument or the doing of any act, but the resigning or removed Trustee shall, nevertheless, execute all instruments and do all acts which would otherwise be necessary to vest such title in any successor. The appointment of a successor Trustee may be effected by a resolution of the Board of Directors or by an amendment to this Trust Agreement with the agreement of the successor Trustee to act as such being evidenced by its execution of such amendment.

C. The successor Trustee may be one or more individuals or one corporation such as a bank or trust company organized under the laws of the United States or any state thereof, with authority to accept and execute trusts.

10.6 Professional Agents

The Trustee may consult with legal counsel (who may or may not be counsel to the Employer) concerning any question which may arise with reference to its duties under

this Agreement. The Trustee's right to consult with legal counsel shall not be subject to the Employer's approval.

10.7 Limitation on Trustee's Duties

The Trustee shall not be required to make any investigation to determine the identity or mailing address of any person entitled to benefits under this Agreement and shall be entitled to withhold making payments until the identity and mailing address of any person entitled to benefits are certified by the Employer. In the event that any dispute shall arise as to the identity or rights of persons entitled to benefits hereunder, the Trustee may withhold payment of benefits until such dispute shall have been determined by a court of competent jurisdiction or shall have been settled by written stipulation of the parties concerned.

10.8 Action by Trustees

The action of individual Trustee shall be determined by the vote or other affirmative expression of the majority thereof, and they shall designate one of their members to keep a record of their determination of matters to be determined hereunder and of all dates, documents and other matters pertaining to their administration of this

Trust; however, no Trustee who is a Participant shall vote on any action relating specifically to himself, unless he is the sole Trustee, and in the event the remaining Trustees by majority vote thereof are unable to come to a determination of any such questions, the same shall be determined by the Board of Directors.

10.9 Indemnification

To the fullest extent permitted by law, the Employer agrees to indemnify, to defend, and to hold the Trustee harmless against any liability whatsoever for any action taken or omitted by it in good faith in connection with this Plan and Trust or its duties hereunder and for any expenses or losses for which it may become liable as a result of any such actions or non-actions unless resultant from its own willful misconduct.

10.10 Separate Trustees

The Board shall have full power and authority to appoint a separate Trustee or Trustees with respect to any portion of the total fund the Board shall so designate. Such separate trustee may be an individual, group of individuals or a corporation and shall have all the powers, duties and obligations otherwise provided for herein as to any trustee

appointed under this agreement but only with respect to the portion of the total fund which has been designated by the Board. Notwithstanding the preceding, if any person appointed as a Trustee also receives direct compensation from the Employer, whether as an Employee, officer or director, such person shall not be entitled to receive any compensation from the trust for his or her services as Trustee.

ARTICLE 11

11.1 Investment of Trust Fund

The Trustee shall invest and reinvest the Trust Fund or any part thereof. Without limiting the generality of the foregoing, the Trustee may invest in bonds, notes, mortgages, commercial or Federal paper, preferred stock, common stock, or other securities, rights, obligations or property, real or personal including shares and certificates of participation issued by investment companies or investment trust, or shares or certificates of participation in commingled funds established by the Trustee. The Trustee may cause any part or all of the assets of this Trust to be commingled with the assets of a similar trust qualified under Code Sections 401(a) and 501(a) by causing such

assets to be invested as part of a common fund of the Trustee, an affiliate of the Trustee, or other fiduciary, the provisions of which are hereby adopted. The Trustee may hold such portion of the Trust Fund as may be deemed necessary for the ordinary administration of the Trust and disbursement of funds by depositing the same in any bank or savings and loan institution including the Trustee, if a bank, subject to the rules and regulations governing such deposits.

11.2 Investment Manager

A. The power of the Trustee to direct, control or manage the investment of the Trust Fund may be delegated to an investment manager appointed by the Employer. Such investment manager, if appointed, must acknowledge in writing that he is a fiduciary with respect to the Trust Fund and shall then have the power to manage, acquire, or dispose of any asset of the Trust Fund. An investment manager must be a person who is (1) registered as an investment advisor under the Investment Advisors Act of 1940; (2) a bank, as defined in that Act, or (3) an insurance company qualified to perform such services under the laws of more than one state.

B. If an investment manager has been appointed, the Trustee shall neither be liable for acts or omissions of such investment manager nor be under any obligation to invest or otherwise manage any asset of the Trust Fund, and the Employer shall not be liable for any act or omission of the investment manager in carrying out such responsibility except to the extent that the Employer violated Section 9.2 with respect to:

1. Such designation,
2. The establishment or implementation of the procedures for the designation of an investment manager; or
3. Continuing the designation, in which case the Employer would be liable in accordance with Section 9.2(B).

11.3 Participant-Selected Investment Funds

A. The participation by Participants in separate Participant-Selected Investment Funds under the Plan shall be established in accordance with the terms and provisions of the Plan, and each Participant shall designate on an Investment Election form supplied by the Committee, signed by the Participant and delivered to the Committee,

the amounts of his Accounts that are to be invested in the Participant-Selected Investment Funds established pursuant to this Section.

B. Each Participant may change his investment directions to provide for the investment of future Contributions among the various Participant-Selected Investment Funds in such increments, or all to any one of them, as the Participant shall elect on a form provided by the Committee, signed by the Participant and delivered to the Committee. The Committee shall promulgate uniform and non-discriminatory rules which shall be communicated to Participants regarding:

1. The types of investment funds;
2. The frequency of change of investment direction of current account balances among separate investment funds;
3. The frequency of change of investment direction of future Participant Contributions or Employer Contributions among separate Participant-Selected Investment Funds;

4. The effective dates of instructions regarding investment directions and changes of investment directions;

5. The fractional (percentage) limitations, if any, in which current account balances may be invested or transferred between funds;

6. The fractional (percentage) limitations, if any, in which future Participant Contributions or Employer Contributions are to be invested between funds; and

7. The periods within which direction must be given if it is to be effective for a particular period.

C. Procedures with regard to any one or more investment funds may vary to reflect the variable or contrasting characteristics of a particular Participant-Selected Investment Fund (i.e., only annual investment direction might be permitted with respect to a fund oriented toward real property investments, while more frequent directions may be permitted with respect to an investment fund characterized by greater liquidity).

11.4 Segregated Accounts

Participant Loans under Section 8.9 shall be treated as Segregated Accounts. Interest and principal payments under a Participant Loan shall be allocated to the Segregated Account.

11.5 Directed Investment Accounts

Subject to the approval of the Committee, each Participant shall have the right to direct the Trustee to segregate funds contributed by him or by the Employer for his benefit and direct the Trustee as to the investment thereof. In the event a Participant shall elect to direct the Trustee to segregate funds and direct the investment of segregated funds, the Trustee shall be relieved of all obligations or responsibilities therefor. The Trustee shall be entitled to charge additional fees commensurate with the special functions required of it under Section 11.5, provided that such additional expenses shall be deducted from the Directed Investment Account. The Trustee may require any such electing Participant to enter into a separate agreement with the Trustee establishing in a form satisfactory to the Trustee, the rights, duties and obligations of the parties hereto including, but not limited

to, specific indemnification of the Trustee by any such Participant.

ARTICLE 12

AMENDMENT, TERMINATION AND MERGER

12.1 Revocation of Trust

The Trust shall be irrevocable but shall be subject to amendment and termination as provided in this Article 12.

12.2 Amendment

The Employer reserves the right to amend this Trust Agreement to any extent and in any manner that it may deem advisable by action of the Board of Directors. The Employer, the Trustee, all Participants, their Beneficiaries and all other persons having any interest hereunder shall be bound by any such amendment; provided, however, that no amendment shall:

A. Cause or permit any part of the principal or income of the Trust to revert to the Employer or to be used for, or be diverted to, any purpose other than the exclusive benefit of Participants or their Beneficiaries;

B. Change the duties or liabilities of the Trustee without its written consent to such amendment;

C. Reduce the value of the Account of any Participant; or

D. Eliminate an optional form of distribution.

12.3 Full Vesting on Termination

The Employer has established the Plan with the bonafide intention and expectation that the Plan will continue indefinitely, and that it will be able to make its Contributions indefinitely, but the Employer shall be under no obligation to maintain any portion of the Plan for any given length of time and may, in its sole discretion, terminate all or any portion of the Plan at any time without any liability whatsoever. In the event of the termination of this Plan or upon complete discontinuance of Employer contributions to the Plan, the full value of the respective portion of the Accounts of all participants affected by the termination or discontinuance shall become fully vested and nonforfeitable. In the vent of partial termination of this Plan, the full value of the Accounts of the Participants involved in the partial termination shall become fully vested and nonforfeitable.

12.4 Termination

The Plan shall terminate (A) on the date specified in a written notice of the termination of the Plan, executed by the Employer and delivered to the Trustee, or (B) the date which is 21 years after the death of the last survivor of the original Participants who were living at the date of execution of the Trust Agreement; provided, however, that if, upon the death of such last survivor, the Trust may continue for a longer period without violation of any law of the jurisdiction to which the Trust is subject, the trust shall not be terminated upon the date 21 years after the death of such last survivor but shall continue until the complete accomplishment of all the purposes for which the Plan and Trust are created, unless sooner terminated under the other provisions thereof.

12.5 Distribution of Assets Upon Termination

Upon the termination of this Plan and after payment of all expenses of the Trust, including any compensation then due the Trustee and agents of the Employer, the Trust assets and all Participants' Accounts shall be revalued according to the procedures provided in Article 7. The Trustee shall distribute such Accounts as directed by the Employer in accordance with the provisions of Article 8.

Upon such termination, all rights, powers, and duties to be exercised or performed by the Employer shall thereafter be exercised or performed by the Committee, including the filling of vacancies on the Committee and the amending of the Plan. In the event the Committee is unable to perform, all rights, powers and duties shall be performed by the Employer.

12.6 Reversion of Assets

Except as provided in Article 4, in no event shall any part of the principal or income of the Trust revert to the Employer or be used for or diverted to any purpose other than the exclusive benefit of Participants or their Beneficiaries.

12.7 Merger or Transfer of Assets

A. In no event shall this Plan be merged or consolidated with any other Plan, nor shall there be any transfer of assets or liabilities from the Plan and/or Trust to any other similar plan or trust unless immediately after such merger, consolidation or transfer, each Participant's benefits, if such other plan and/or trust were then to terminate, would be at least equal to or greater than the benefits which the Participant would have been entitled to

had the Plan and/or Trust been terminated immediately before such merger, consolidation or transfer.

B. The Trustee possesses the specific authority to enter into merger agreements or direct transfer of assets agreements with the trustees of other retirement plans described in Code Section 401(a) and to accept the direct transfer of plan assets, or to transfer plan assets, as a party to any such agreement.

C. The Trustee may accept a direct transfer of plan assets on behalf of an Employee prior to the date the Employee satisfies the Plan's eligibility condition(s). If the Trustee accepts such a direct transfer of plan assets, the Committee and Trustee shall treat the Employee as a Participant for all purposes of the Plan except the Employee shall not make Voluntary Non-Deductible Contributions under Article 4 nor shall the Employee share in Employer Contributions under the Plan until he actually becomes a Participant in the Plan.

D. The Trustee shall maintain a separate Account designated as a "Trustee-to-Trustee Transfer Account" for the benefit of the Employee on whose behalf the Trustee accepted the transfer in order to reflect the value of the

transferred assets. In all respects, the Trustee and the Committee shall hold, administer and distribute a Trustee-to-Trustee Transfer Account in the same manner as an Employer Account, provided that a Participant shall not withdraw any portion of a Trustee-to-Trustee Transfer Account established by reason of a trustee-to-trustee transfer or merger prior to his termination of Employment.

EXECUTION

This Plan is executed this 31st day of December, 1987, by duly authorized officers of the Employer and by the Trustee.

THE ORTHOPEDIC CLINIC

By_____
Paul E. Palmer, President

By_____
Robert A. Johnson, Secretary

NORTHERN TRUST BANK OF ARIZONA, N.C.

By_____
Its_____

_____
Robert E. White, M.D., Trustee

_____

Norman F. Fee, M.D., Trustee

Anthony T. Yeung, M.D., Trustee

EXHIBIT 6

January 5, 1990

REGISTERED MAIL

SMM
U.S. Department of Labor
Washington, D.C. 30316

Re: Orthopedic Clinic 401(k) Profit Sharing
Thrift Plan and Trust Agreement
EIN #86-0087236
Plan #002

Dear Sirs:

We are enclosing a copy of the Summary of Changes for the above Plan, which was needed because of what we deemed to be a material modification of the Plan.

Very truly yours,

JENNINGS, STROUSS & SALMON

By

Robert J. Werner

Enclosure

RJW:jp

cc: Chuck Redwing

SUMMARY OF CHANGES TO THE ORTHOPEDIC CLINIC 401(k) PROFIT SHARING THRIFT PLAN AND TRUST AGREEMENT

Employer Identification Number (EIN): 86-0087236

Plan Number (PN): 002

The Clinic has amended the Plan. The changes are generally effective January 1, 1989. This notice updates sections of the Updated Summary Plan Description (SPD). Please mark the changed sections in your SPD and file this notice with the SPD.

This summary brings you up to date with the major changes affecting you as a member of the Plan.

Keep in mind that the provisions of the amended Plan document will be used if any changed sections in this summary do not agree with the Plan document.

The Plan Trustee referred to on pages 13 and 6 of the Updated Summary Plan Description has been changed to:

Harris Trust Bank of Arizona
6263 North Scottsdale Road
Suite 100
Scottsdale, Arizona 85250
(602) 951-460

SUMMARY OF CHANGES TO THE THE ORTHOPEDIC CLINIC 401(k) PROFIT SHARING THRIFT PLAN AND TRUST AGREEMENT

Employer Identification Number (EIN): 86-0087236
Plan Number (PN): 002

The Clinic has amended the Plan to comply with new laws which affect the operation of all plans like ours. The changes are generally effective January 1, 1987. This notice updates sections of the Updated Summary Plan Description (SPD). Please mark the changed sections in your SPD and file this notice with the SPD.

This summary brings you up to date with the major changes affecting you as a member of the Plan. Keep in mind that the provisions of the amended Plan document will be used if any changed sections in this summary do not agree with the Plan document.

The updated sections of your SPD now read as follows:

Withdrawals While Employed (Page 9 of SPD)

Withdrawals

All withdrawal requests must be submitted in writing to the Committee. The Committee will establish a uniform non-discriminatory policy for making withdrawals.

Pre-Tax Account

The tax saving features of the Plan are offered by the government to encourage employees to save for their retirement. By law, in-service withdrawals of pre-tax voluntary contributions made to your Employee Account are allowed only in situations of what the Internal Revenue Service calls "serious financial hardship." This means that you must be able to show that you need the money to cover immediate and

heavy financial needs for which you have no other means of payment. However, once you reach age 59-1/2 and have been a member of the Plan for 60 months or more, you may withdraw amounts from your pre-tax account for any reason.

Loss of Matching Contribution

If you make a withdrawal during the year from your pre-tax account, you will lose your right to the Clinic Matching Contribution for that year. This restriction does not apply if you make a withdrawal after you are age 59-1/2. See page 3 for more about the Matching Contribution.

Employer Account

You may withdraw amounts from your Employer Account after you reach age 59-1/2 and have been a member of the Plan for 60 months or more.

After-Tax Account

You may withdraw amounts from your after-tax voluntary contributions at any time and for any reason. (After-tax contributions were allowed prior to January 1, 1987.)

Tax on Withdrawals

It is important to understand that withdrawals of amounts from your pre-tax account or Employer account will be taxable as ordinary income in the year withdrawn. Amounts you withdraw from your after-tax account are taxed only if you withdraw more than the value of your aggregate after-tax contributions. If you are only withdrawing your after-tax contributions and none of the earnings, your withdrawal is not taxed. Also, a 10% penalty tax is added for any taxable distribution made to you prior to age 59-1/2.

Participant Loans

You may make a written loan application to the committee if you wish to borrow a portion of the vested interest in your account. More information regarding loan provisions can be obtained from the Clinic Manager.

Receiving Your Money On Termination Of Of Employment (Page 9 of SPD)

Leaving the Clinic

You will receive the vested portion of your account balances if you quit before age 65 for any reason other than disability. If you become disabled while working for the Clinic, your accounts will become 100% vested (owned by you). If your retire on or after the normal retirement age of 65, your account balances will be also be 100% vested.

Death

The Plan also protects your family or other beneficiary if you should die. If you die while you are employed by the Clinic, your accounts will be 100% vested. The entire account balance including your Employer Account will be paid to your beneficiary.

If you die after you quit working for the Clinic, your beneficiary will receive only the portion of your account which was vested when you died.

Filing a Claim

To receive payment, you or your designated beneficiary must file a written claim with the Clinic Manager. All distributions will be made as soon as possible after the December 31 following the date the claim is filed.

Method of Payment (Page 10 of the SPD)

Lump Sum Payment

All payments from the Plan are made in a single payment. This is called a lump sum payment. It is important to remember that whenever you receive a payment from the Plan, taxes will be due in the year the money is received. To postpone paying taxes for an even longer period of time, you may roll the money over into an Individual Retirement Account (IRA) or another qualified plan. That way, you pay taxes only when you take money out of the IRA or the other plan.

If you die and your spouse is your beneficiary, he or she may be able to roll the payment to an IRA to avoid taxes.

All plan distributions received prior to age 59-1/2 are also subject to a 10% penalty tax, unless the distribution is made as a result of your death, disability or early retirement after age 55.

Time of Payment

The time of payment depends on the value of your vested account. If the value is $3,500 or less, your vested account will be paid in a lump sum to you or your beneficiary within a reasonable period of time after you quit. The latest date is December 31 of the year following the year in which you quit or die.

If the value is more than $3,500, you can elect immediate payment or defer payment to a later date. You may not defer payment past your 65th birthday if you are not working for the Clinic. If you do work past age 65 for the Clinic, you may defer payment until you actually quit. However, you may not defer payment once you reach the required beginning date under federal law. Unless you meet certain special rules, your required beginning date is the April 1 following the end of the calendar year in which you

reach age 70-1/2. You must begin payment on your required beginning date even if you are still working for the Clinic.

If you die before payment of your account begins and the value of your account is more than $3,500, your beneficiary may defer payment up to 5 years.